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—Metro Broadcasting, Inc.
MM Docket No. 83-140

Aeronautical Radio Navigation Service

Cable systems may operate on frequencies allocated for aeronautical radio if they meet frequency offset, monitoring and cumulative signal leakage requirements.
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Aeronautical Service

(See: Aeronautical Radio Navigation Service-*Amendment of Part 76*)

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In hearing matter of mutually exclusive CP application for FM station, Review Board affirmed ALJ's grant. Applicant's substantial preference under diversification criterion, even when diminished by demerits for inaccurate affidavits outweighed preferences given competitor.
—Hampshire County B/cing Co., Inc.
BC Docket No. 81-159

Amateur Radio Service

Amateur licensee was found to have cheated on Morse code examination. Therefore, his station license was revoked, his operator license suspended, and his application for a higher class license denied.
—Vincent J. Beard
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Report and Order adopted establishing general guideline principles to be used in future deregulation rule making proceedings and amending Parts 15, 73 and 74 of the Rules to eliminate unnecessary technical quality regulations. Guideline principles have been established for regulations relating to interference control, spectrum efficiency, interoperability and technical quality.

—Technical Regulations
GEN. Docket No. 83-114

Antenna

Reconsideration of *Licensing of Space Stations in the Domestic Fixed Satellite Service and Related Revisions of Part 25 of the Rules and Regulations* including revisions of space station standards and of Part 25 rules relating to antenna performance standards granted to an extent and denied in all other respects.

—Reduced Orbital Spacing
CC Docket No. 81-704

Antenna, Radiation Pattern

Application for review denied. Low power television and television translator applicants proposing to use composite or custom directional antennas must submit specific radiation pattern data with their applications. A low power television applicant that failed to submit a composite antenna radiation pattern despite repeated opportunities will have its application returned as defective.

—Katy Communications, Inc.

Application, Acceptance of

Application for review of Bureau's action denying petition for reconsideration and acceptance of application *nunc pro tunc,* and returning low power TV application as unacceptable denied. Low power TV application which does not contain vertical antenna sketch as required by FCC Form 346 is incomplete and unacceptable for filing.

—American Christian TV System, Inc.

Application for review of Bureau's action returning both amendment and application for CP granted to an extent and denied otherwise. A major amendment to pending low power television application to change site due to loss of antenna site, which was filed during the 90-day amendment period set forth in June 23, 1982 *Public Notice* was unacceptable since it did not meet the amendment criteria.

—American Christian TV System, Inc.

Application, Amendment of

Memorandum Opinion and Order adopted affirming decision of Private Radio Bureau to dismiss application of Bellar Communications, Inc. for failure to satisfy requirements of Section 90.627 of Commission's rules.

—Bellar Communications, Inc.

Application, Amendment of, Substantial Changes

In hearing matter of mutually exclusive CP applications for new television station, Review Board affirmed ALJ's grant. ALJ declined to make misrepresentation findings in the absence of an issue. Neither applicant was entitled to a Section 307(b) preference and ALJ properly refused to add a lottery issue.

—Adell Broadcasting Corp.

BC Docket No. 80-471

Application, Defective

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In hearing matter of mutually exclusive CP applications for FM station, Review Board affirmed ALJ's grant. Losing applicant disqualified for lack of candor in coloring testimony that it could obtain a transmitter site lease and for failing to notify the Commis-

sion of a letter formally denying applicant use of the land for a transmitter site.
(See: Application, Amendment of, Substantial Changes-*Adell Broadcasting Corp.*)

(See Also: Affidavit Improperly Made-*Hampshire County B/cing Co., Inc.*)
—Valley FM Radio
BC Docket No. 80-379

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Common Carrier, Costs, Allocation of
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Comparative Coverage Issue
Although a diversification preference normally prevails, where that preference is slight, the Board awards permit to competitor having moderate to substantial coverage preference. Slight integration preference is also not dispositive.
—Christian B/cing of Midlands, Inc.
BC Docket No. 81-178

Comparative Criteria
(See: Comparative Coverage Issue-*Christian B/cing of Midlands, Inc.*)

Comparative Hearing

Petition for reconsideration of Commission Order affirming Review Board's Decision, 55 RR 2d 23 (1983), denying petitioner's applications for AM and/or FM radio station granted in part and dismissed in part. AM applications severed from consolidated proceeding and remanded for further evidentiary hearings on reporting violation issue against winning applicant. Dismissed portion of petition repeated an argument already made and considered.

—*Merrimack Valley B/cing, Inc.*

BC Docket No. 80-28

(See Also: Administrative Law Judge, Authority of-*Metro Broadcasting, Inc.*)

Coverage, Issue

(See: Affidavit Improperly Made-*Hampshire County B/cing Co., Inc.*)

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(See: Comparative Criteria-*Christian B/cing of Midlands, Inc.*)

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(See: Antenna-*Reduced Orbital Spacing*)

Emergency Relief, Petition for

Review Board denied motion for emergency relief to clarify scope of remanded issues. Request for clarification should be addressed initially to ALJ.

—*California B/cing Corp.*

BC Docket No. 80-698

(See: Common Carrier, Coasts, Allocation of-*MTS/WATS Market Structure*)

Equipment Authorization Program

Notice of Proposed Rule Making adopted recommending Parts 2 and 18 of the Rules be changed to eliminate burdensome and obsolete

regulations and implement a new equipment authorization program for industrial, scientific, and medical (ISM) equipment, and provide technical standards for four new ISM frequency bands.
—*Revision of Parts 2 and 18*
GEN. Docket No. 20718

Equipment Costs
(See: Common Carrier, Costs, Allocation of-*MTS/WATS Market Structure*)

Equipment Industrial, Scientific and Medical
(See: Equipment Authorization Program-*Revision of Parts 2 and 18*)

Female Ownership-Participation
Review Board affirmed *ID's* FM construction permit grant. Winner's 100% integrated minority ownership enhancement (plus slight credits for past broadcast experience and proposed future local residence) overcame second-place applicant's 100% integrated female ownership (plus slight comparative coverage preference); neither held any significant media interests.
—*Santee Cooper B/cing Co.*
MM Docket No. 83-158

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Nondisclosure
(See: Candor-Valley *FM Radio*)

Ownership and Management, Integration of
(See: Administrative Law Judge, Authority of-*Metro Broadcasting, Inc.*)

Political Broadcast, Public Inspection File
Complaint filed against television station KCPQ, Tacoma, Washington regarding the airing of a motion picture featuring presidential candidate Ronald Reagan. Complainant failed to make an "equal opportunities" request within one week from the airing of the picture.
—*Ron Culpepper*

Political Broadcast, Seven-Day Rule
(See: Political Broadcast, Public Inspection File-*Ron Culpepper*)

Private Operational-Fixed Microwave Service
Petitions for reconsideration of *First Report and Order*, 86 FCC 2d 299, denied. Licensees in Private Operational-Fixed Microwave Service (OFS) permitted to distribute their products/services to their customers in all boards allocated for OFS. Earlier decision modified by designating two-year period during which licensees in OFS will be precluded from using facilities to deliver video entertainment material in bands other than those above 21.2 GHz.
—*Operational-Fixed Service*
Docket No. 19671

Radio Frequency Device, Authorization
(See: Equipment Industrial, Scientific and Medical-*Revision of Parts 2 and 18*)

Reconsideration, Petition for, Denial of
(See: Private Operational-Fixed Microwave Service-*Operational-Fixed Service*)

Reconsideration, Petition for, Grant of
(See: Comparative Hearing-*Merrimack Valley B/cing, Inc.*)

Remand

Where winning applicant in comparative proceeding lost transmitter site, and the case was held in abeyance pending a new site, Review Board remands proceeding to determine whether applicant has demonstrated due diligence in its efforts to locate a new site.
—Grand Radio, Inc.
BC Docket No. 80-717

Proceeding remanded on a site availability issue and for issuance of a Supplemental Initial Decision.
—South Florida B/cing Company, Inc.
BC Docket No. 82-731
(See: Comparative Hearing-*Merrimack Valley B/cing, Inc.*)

Rules, Failure to Conform
(See: Application, Amendment of-*Bellar Communications, Inc.*)

Rules, Modification of
(See: Antenna-*Reduced Orbital Spacing*)

Satellite, Direct Broadcast

Where contract to build satellites is signed prior to due diligence deadline, but contains significant contingencies, and where disqualifying nature of such contingencies is only recently expressed, post-deadline efforts will be considered and permittee will not have permit canceled on basis of contingencies. Rather, launch authority will be granted, but specific channel and orbital assignments will not be made until contingencies are satisfied or removed.
—CBS, Inc.

Extension of the due diligence deadline is not warranted to allow a conditional permittee to await another Commission proceeding concerning its fitness as a licensee, where the permittee has made no

unequivocal commitment to proceed with the system even in the event of a favorable disposition in the pending proceeding.
—CBS, Inc.

Conversion from half-CONUS signals to full-CONUS signals is not a major amendment and will be permitted where technical analysis indicates that it will not impose constraints on the Region 2 Plan, despite its nonconforming nature. Requests for different channels and orbital positions are not major amendments and will be granted where the requested channels and positions are available and no other party is prejudiced.
—CBS, Inc.

Satellite Earth Station Facilities
(See: Antenna-*Reduced Orbital Spacing*)

Severance
(See: Comparative Hearing-*Merrimack Valley B/cing, Inc.*)

Site
(See: Remand-*Grand Radio, Inc.*)

Site Availability
(See Also: Remand-*South Florida B/cing Company, Inc.*)

Suburban Community 307(b) Issue
(See: Application, Amendment of, Substantial Changes-*Adell Broadcasting Corp*)

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(See Also: Candor-*Valley FM Radio*)

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Television Station, Technical Standards
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Transmission, First Local
(See: Administrative Law Judge, Authority of-*Metro Broadcasting, Inc.*)

(See Also: Female Ownership-Participation-*Santee Cooper B/cing Co.*)

Application, Amendment of, Substantial Changes
Candor
Lottery, Advertising
Suburban Community 307(b) Issue

In hearing matter of mutually exclusive CP applications for new television station, Review Board affirmed ALJ's grant. ALJ declined to make misrepresentation findings in the absence of an issue. Neither applicant was entitled to a Section 307(b) preference and ALJ properly refused to add a lottery issue.
—*Adell Broadcasting Corp.*
BC Docket No. 80-471

FCC 84R-76

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Adell Broadcasting Corporation Mt. Clemens, Michigan	BC Docket No. 80-471 File No. BPCT-781005KE
Michigan Channel 38, Inc. Warren, Michigan	BC Docket No. 80-474 File No. BPCT-790130LX
For Construction Permit for New Television Broadcast Station	

Appearances

Forbes W. Blair and *William D. Silva* on behalf of Adell Broadcasting Corporation; *E. William Henry*, *Harvey J. Shulman*, *James A. Gammon*, and *James E. Meyers* on behalf of Michigan Channel 38, Inc.

DECISION

Adopted: October 23, 1984; Released: October 26, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL

BOARD CHAIRMAN MARINO:

1. The principle question presented in this comparative case to select a new broadcaster for UHF Channel 38 in the Detroit urbanized area is whether the winning applicant misrepresented or lacked candor in the proceeding. After conducting our own review in the light of the parties' arguments, we affirm the Initial Decision.

2. Following a trial-type hearing, presiding Administrative Law Judge (ALJ) Luton issued an Initial Decision (I.D.), granting Adell Broadcasting's application predicated on his conclusion that Adell Broadcasting was the superior comparative applicant because of its 100% full-time integration proposal, qualitatively enhanced by local residence and civic activities, minority-female enhancement, and broadcast experience, versus Channel 38's proposed 70% full-time and 5% part-time integration. FCC 84D-12, released February 23, 1984. In addition to the comparative issue, the ALJ resolved a Section 1.65 issue favorably to Adell Broadcasting and ruled that neither applicant was entitled to a Section 307(b) preference. Exceptions to the I.D. have been filed by Channel 38.

3. The major portion of Channel 38's brief relates to the ALJ's findings and conclusions concerning the Section 1.65 issue. Based on essentially the same facts found under the specified issue, Channel 38 contends that Adell Broadcasting should have been disqualified or assessed a substantial demerit for having misrepresented and lacked candor throughout this proceeding. Channel 38 also contends that the ALJ erred in failing to award it a Section 307(b) preference and in failing to specify an issue against Adell Broadcasting relating to the broadcast of an illegal lottery. We have reviewed the Initial Decision in light of the exceptions and briefs, oral argument held July 6, 1984, and our examination of the record. We adopt the ALJ's findings and conclusions, except as modified below, and affirm his ultimate conclusion that grant of Adell Broadcasting's application will better serve the public interest, convenience and necessity.

4. *Section 1.65 Issue.* By Memorandum Opinion and Order, FCC 82M-0423, released February 9, 1982, the ALJ added an issue to determine whether Adell Broadcasting had violated Section 1.65 by failing to report the elections of James Panagos and Dominick Carnovale to Adell Broadcasting's board of directors and, if so, the effect on its basic or comparative qualifications. Section 1.65 of the Commission's Rules, 47 CFR 1.65, requires an applicant to amend its pending application within 30 days whenever the information furnished therein is no longer substantially accurate and complete in all significant respects, or whenever there has been a substantial change as to any other matter which may be of decisional significance. The names of all of the applicant's directors are

called for by Section II, page 3 of Adell Broadcasting's application form (FCC 301).

5. Addition of the above issue primarily stemmed from testimony tendered by Adell Broadcasting principal Franklin Z. Adell during the September 28-29, 1981 hearing sessions concerning James Panagos' role with the applicant. Adell, who is Adell Broadcasting's president, chairman of the board of directors, and a 90% shareholder, stated that Panagos was not a director, a statement that was in apparent contradiction with testimony he had previously given at a May 1981 deposition session. Pursuant to a motion to enlarge issues filed jointly by the competitors of Adell Broadcasting shortly after the hearing sessions, the ALJ ruled that a Section 1.65 issue would be added to explore the matter. He explicitly rejected, however, movant's request for a broader based misrepresentation or lack of candor issue, noting that apparent inconsistencies could be fully explored under the specified issue, a position then urged by the Broadcast Bureau (now called the Mass Media Bureau). FCC 82M-0423, *supra*.

6. Hearing sessions on the additional issue were held on May 10-12 and September 28, 1982, with Adell, Panagos, Carnovale, George E. White, and R. Antoinette Riley appearing. Riley and White are the other two shareholders in Adell Broadcasting, each owning 5%, respectively. Following the May hearing sessions, the competitors once again jointly filed a petition to enlarge issues seeking a misrepresentation or candor issue predicated on asserted inconsistencies made by the Adell Broadcasting principals concerning the election of Panagos and Carnovale to the applicant's board of directors. The Bureau and Adell Broadcasting both opposed addition of the issue. The ALJ summarily denied the petition, observing that the parties had a full opportunity to develop a record on this matter and that nothing had been presented by them that indicated that a separate misrepresentation or lack of candor issue was warranted. FCC 82M-2546, released August 24, 1982.

7. In his I.D., the ALJ, at the outset, chastised Channel 38's continuous efforts to impart a misrepresentation flavor to this matter. He noted that Channel 38 set forth 13 alleged instances of misrepresentation and lack of candor by Mr. Adell. I.D., para. 59. The ALJ characterized this effort as "flyspecking" Adell Broadcasting's case after it had been presented, and described the asserted instances of misrepresentation or candor by Mr. Adell as "nothing more than an attempt to reargue a position long ago considered and rejected. . . ." *Id.*, paras. 49, 58 60. He stated further that the misrepresentation or lack of candor matter urged by Channel 38 was not an issue in this case and that no findings would be made on any of it. *Id.*, para. 60.

8. His findings with respect to the specified issue are set forth in paragraphs 50-56 of the I.D. Briefly, the ALJ found that there had been a stockholders meeting of Adell Broadcasting on February 7, 1981 at Adell's home, attended by Adell, his wife Sharon, Riley, White, Panagos and Carnovale. I.D., para. 50. The meeting resulted from what had begun as an informal social gathering. *Id.* During the meeting, Adell, his wife, Carnovale, Panagos, Riley and White were all elected to serve as directors until the next annual meeting. *Id.* Immediately after the stockholders meeting adjourned, a meeting of the board of directors took place where the by-laws were amended to increase the number of directors to include Panagos and Carnovale. *I.D.*, para. 51. Subsequently, during the month of February 1981, Adell placed a conference call with Riley and White to reconsider the decision to make Panagos and Carnovale directors of Adell Broadcasting. *Id.*, para. 52. They all agreed to rescind their previous decision and decided to consider Panagos and Carnovale as non-board members. *Id.* They agreed that should they be awarded a construction permit they would at that time consider making Panagos a director. *Id.* Neither the election of Panagos and Carnovale nor the change in by-laws was ever reported to the Commission. *Id.*, para. 51.

9. Adell explained his May 1981 deposition response (where he had said Panagos was a director) by asserting that he had "made a mistake in saying that... He was never a director. I never believed that he was director. I wanted him [at] a future date to be a director." *Id.*, para. 53 quoting tr. 364. All of the Adell Broadcasting principals testified that it was their view that before Panagos and Carnovale could "officially" become directors [rather than proposed directors], their application would have to be amended, which had not been done. *Id.* Although the ALJ found that the elections of Panagos and Carnovale and the change of by-laws were not reported to the Commission, he intimated that it was far from clear whether an applicant has a duty to report such matters where they are rescinded within the 30-day reporting period. *Id.*, para. 109. In any event, he concluded, even if Adell Broadcasting had a duty to report these matters to the Commission, its failure to do so was "utterly without decisional significance. . . . " because neither Panagos nor Carnovale had any ownership interest in the applicant and they were not intended to be a part of Adell Broadcasting's integration proposal. *Id.*, para. 110. Finally, he opined that there had been no showing that Adell Broadcasting had attempted to conceal facts or to mislead the Commission and that the matters not reported were simply too minor to support a claim that concealment or misrepresentation was involved or even attempted. *Id.*, para. 111. He ruled that not even a minor comparative demerit would be imposed against Adell Broadcasting on this matter.

10. In its exceptions, Channel 38 contends initially that the ALJ erred in failing to consider or to make any findings and conclusions concerning Adell's misrepresentations and lack of candor. We disagree. The ALJ's statement that he would not make any findings on the misrepresentation or lack of candor matter urged by Channel 38 (*see* I.D. para. 60) directly followed a paragraph in which the ALJ recited a list of 13 alleged instances of misrepresentation and lack of candor by Mr. Adell urged by Channel 38 in its Proposed Findings of Fact and Conclusions of Law (*id.*, para. 59). The relevant facts underlying those asserted instances of misconduct are essentially duplicative of the findings set forth in paras. 50-56 of the I.D. by the ALJ under the Section 1.65 issue, without the gloss of misrepresentation urged by Channel 38. Consequently, the ALJ was correct in his refusal to respond to every alleged misstatement, ambiguity, or error gleaned out of more than 2000 pages of oral transcript by Channel 38.

11. Moreover, contrary to the exceptions, the ALJ's failure to respond to Channel 38's list of alleged misconduct did not conflict with his prior rulings or with any reasonable view of the facts of this case. As previously noted above in paragraph 5 of our Decision, the ALJ's initial opinion adding the issue modified the thrust of the requested issue from an emphasis on misrepresentation and lack of candor to one of a reporting violation. FCC 82M-0423, *supra*, para. 5. And, although the ALJ ruled that inconsistent statements made by the Adell Broadcasting principals with respect to the matter above could be explored under the issue, he indicated further that the request for a misrepresentation or candor issue was predicated on "a mass of mere argument, including strenuous characterizations of certain of the testimony." *Id.* His prior ruling cannot reasonably be construed to allow Channel 38 to challenge virtually every statement, regardless of its relevance to the issue in question, uttered by the Adell Broadcasting principals. Moreover, his second opinion, released August 24, 1982 (FCC 82M-2546), in which he expressly denied a petition requesting a misrepresentation or lack of candor issue, was even more specific, stating that "[n]othing presented by [petitioner] now indicates that a separate misrepresentation or lack of candor issue is warranted." The ALJ fully considered the facts aired in this proceeding, and concluded that there was no basis for a misrepresentation or lack of candor issue. We agree.

12. Channel 38 also advances a somewhat related contention that the ALJ was required to make findings on its thirteen instances of alleged misconduct even in the absence of a specific issue, since truth is always in issue in Commission proceedings. This contention, too, is unpersuasive. As a general proposition, and undisputed by the ALJ or Adell Broadcasting, Channel 38 is correct that truth and candor are always in issue. *See Old*

Time Religion Hour, Inc., 54 RR 2d 989, 994 (Rev. Bd. 1983). Thus, an applicant may be disqualified for lack of candor where it occurs "before the judge's own eyes," *id.*, quoting *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981) or for false testimony since specific notice to an applicant that he must testify truthfully is superfluous. *Id.* Notwithstanding this general proposition, however, the Court in *RKO General, Inc.*, *supra* at 232, cautioned the Commission that such misconduct "should be of such a blatant and unacceptable dimension that its existence cannot be denied." Otherwise, as presuasively set forth by the ALJ in paragraph 58 of his I.D., great mischief would undoubtedly ensue from encouraging applicants to "flyspeck" an opponent's case after it has been presented. "Given the ingenuity of counsel and the zeal with which they urge their causes, it will be the rare case in which witness testimony cannot be subjected to attack (however frivolous in fact) at the conclusion of the case on grounds that the witness lied or was less than forthcoming in his testimony." I.D., at para. 58. *See also Millard Orick, Jr.*, 89 FCC 2d 571, 51 RR 2d 166 (Rev. Bd. 1982), *rev. denied*, FCC 82-479, released November 3, 1982. *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1099-1100 (Rev. Bd. 1982). Here, it is significant that neither the Bureau, which opposed the addition of a misrepresentation issue on two occasions, nor the ALJ, who saw and heard the witnesses, concluded that there had been any misrepresentation or lack of candor on the part of the Adell Broadcasting principals in this proceeding. The ALJ's determination in this regard is entitled to considerable weight. *See WTAR Radio-TV Corp.*, 76 FCC 2d 239, 243 (1980); *Gilmore Broadcasting Corp.*, 95 FCC 2d 289, 293 (Rev. Bd. 1983). Channel 38's assertion of error must fail.

13. Channel 38's final contention that the ALJ erred in failing to disqualify Adell Broadcasting or, alternatively, to assess it a substantial demerit for misrepresentation, lack of candor, or violation of Section 1.65 will be rejected since exceptor has not demonstrated any error on the part of the ALJ. Rather, Channel 38's contention appears to turn on its suggestion in its introductory preface that the Adell Broadcasting principals concocted the story of the rescission of the elections of Panagos and Carnovale for having failed to report the elections to the Commission within 30 days of the February 7 meeting or because Mr. Adell was concerned that Panagos' election would create a conflict with Panagos' position at Station WGPR-TV where he was employed. Channel 38 Exceptions at 16-17. This version of the facts, however, is based on pure speculation, having no persuasive support in the record evidence, and was totally rejected by the ALJ, who credited the collective testimony of five different witnesses. As noted above in paragraph 12, the ALJ's findings are entitled to considerable weight and our own examination of the record persuades us that the ALJ's findings and conclusions fairly and accurate-

ly reflect the record evidence, fully justifying affirmance of his refusal to assess a demerit against Adell Broadcasting on this matter.

14. *Section 307(b) Issue.* Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), requires the Commission to "... make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." A Section 307(b) issue was added here because the applicants selected different communities of license. The ALJ concluded in his I.D. that neither applicant was entitled to a Section 307(b) preference because of the proximity of Warren and Mt. Clemens to one another and to Detroit, and the fact that both applicants propose to serve substantially the same areas and populations. I.D., para. 120. Channel 38 claims in its exceptions that it is entitled to a Section 307(b) preference because the population of Warren, Michigan, its specified community of license, has an 8 to 1 edge in population over Mt. Clemens. Channel 38 Exceptions at n.34. We have previously held, however, that the size of the suburban communities is only one factor to be considered along with the nature of the broadcast facility sought. In television proceedings, the service area for Section 307(b) purposes "should be defined in terms of coverage and not in terms of artificial political boundaries." *Cleveland Television Corp.*, 91 FCC 2d 1129, 1137 (Rev. Bd. 1982), *rev. denied*, FCC 83-235, released May 18, 1983. *See also Buena Vista Telecasters of Texas, Inc.*, 94 FCC 2d 625, 627-628 (Rev. Bd. 1983). The ALJ's conclusion will be affirmed since it is fully consistent with Commission policies and precedent. *Buena Vista, supra; Cleveland Television, supra.*

15. *Petition to Enlarge Issues.* Channel 38 contends that the ALJ erred in not adding an issue against Adell Broadcasting to inquire into George White's role in the broadcast of illegal lottery information over Station WPGR-FM, Detroit, during the time White was the station's program director. As noted above in paragraph 6, White is a 5% shareholder of Adell Broadcasting. The ALJ denied the requested issue on the ground that the movant had failed to demonstrate that the broadcasts were indeed in violation of the federal lottery statute (18 U.S.C. §1304) or Commission rules (Section 73.1211). FCC 82M-2903, released September 20, 1982. We conclude that the ALJ properly denied the requested issue. First, White was merely an employee at the station rather than an owner who would be legally responsible for the purported misconduct regardless of actual knowledge. *See WIGO, Inc.*, 85 FCC 2d 196, 48 RR 2d 1363 (1981). Second, White testified at hearing that the station had a religious director who was responsible for the religious programming. Tr. 610-611. White added that the religious director reported directly to the "station manager and the general manager, the owners." Tr. 611. Finally, White

stated that during his tenure at the station one of his duties had included alerting the station to be diligent in policing the ministers it had on the air. Tr. 624-625 630. He noted that he had sent several memos to the owner, a minister himself, leaving the ultimate decision of policing to the owner and the religious director. Tr. 624. In view of the above facts, Channel 38's exceptions will be denied.

16. *Summation.* The ALJ's award turned on the ownership participation of the respective applicants. Channel 38 acknowledges that this determination is decisive if it does not prevail on its misrepresentation or lack of candor arguments. Tr. of Oral Arg. 2270. Since Channel 38 has not prevailed on its contentions, Adell Broadcasting's participation superiority remains the critical factor in this proceeding. Channel 38 correctly argues that it is entitled to a preference (albeit very slight) for its auxiliary power proposal. *See Washington's Christian TV Outreach, Inc.*, FCC 84R-70, released October 9, 1984, para. 38. But that preference is far outweighed by the integration component and not sufficient to tip the scale in Channel 38's favor. *Id.*, para. 43. Thus, we affirm the ALJ's ultimate conclusion that a grant of Adell Broadcasting's application would better serve the public interest.

17. ACCORDINGLY, IT IS ORDERED, That the motion requesting correction of transcript filed by Michigan Channel 38, Inc. on July 30, 1984, IS GRANTED; and

18. IT IS FURTHER ORDERED, That the application of Adell Broadcasting Corporation (File No. BPCT-781005KE) for authority to construct a new television station at Mt. Clemens, Michigan, IS GRANTED; and the application of Michigan Channel 38, Inc. (File No. BPCT-790130LX) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 84D-12

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Adell Broadcasting Corporation Mt. Clemens, Michigan	BC Docket No. 80-471 File No. BPCT-781005KE
Michigan Channel 38, Inc. Warren, Michigan	BC Docket No. 80-474 File No. BPCT-790130LX
For Construction Permit for New Television Broadcast Station	

Appearances

Forbes W. Blair, Esq., *Victor G. Hanson, Esq.*, and *Ned L. Mann, Esq.*, on behalf of Adell Broadcasting Corporation; *James Gammon, Esq.*, *Joseph E. Dunne, III, Esq.*, *Richard Gay, Esq.*, and *E. William Henry, Esq.*, on behalf of Michigan Channel 38, Inc. (formerly Trinity Television Corporation); and *Joseph Belisle, Esq.*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: February 21, 1984; Released: February 23, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Adell Broadcasting Corporation (Adell) and Michigan Channel 38, Inc. (Channel 38) for a construction permit for a new commercial television station. Adell specifies Mt. Clemens, Michigan, and Channel 38 specifies Warren, Michigan. The case was designated for hearing on the standard comparative and other issues, including a Section 307(b) issue. By an order released April 7, 1981, an issue was added against Channel 38's predecessor, Trinity Television Corporation (TTC) relating to the use of promotional rate cards. By an order released February 9, 1982, a Section 1.65 reporting issue was added against Adell.

2. Channel 38 was formed as the result of the merger of TTC and Macomb Broadcasting Company (Macomb), two prior applicants in this proceeding whose joint request for approval of the merger was granted by Order FCC 83M-1294, released April 20, 1983. As a result of the merger, Macomb's application was dismissed with prejudice, TTC's application was amended in accordance with the agreement between the two parties, and Channel 38 was substituted for TTC as the applicant.

Findings of Fact

Adell Broadcasting Corporation

3. Adell is a Michigan corporation with 100,000 authorized shares of common stock. A total of 10,000 shares has been subscribed or purchased by three persons. The stockholders/subscribers, officers, and directors of Adell are as follows:

Name	*Office Held*	*Stock Held/Subscribed*	*Percentage of Ownership*
Franklin Z. Adell	President Chairman, Board of Directors	1800/7200	90%
George E. White	Vice President	100/400	5%
Sharon D. Adell	Secretary/Treasurer Director	—	—
R. Antoinette Riley	Director	100/400	5%

4. Franklin Z. Adell has resided in the Detroit, Michigan, area all of his life. He currently resides in Birmingham, Michigan. At age 20, he left college to start a business rebuilding and selling automobile engines (Adell Ex. 2). In 1949, a little more than a year after starting the engine rebuilding business, Mr. Adell was awarded a franchise to sell and service Packard automobiles. He relinquished his automobile franchise in the summer of 1950 and shortly thereafter was drafted into the U.S. Army. Following his military service, Mr. Adell sold real estate for a time, and when his older brother invented and patented a stainless steel moulding that fits over the edge of an automobile door, he and his brother formed Adell Industries, Inc., and began manufacturing these mouldings in a Michigan plant. By 1969, the original 1,000 square foot manufacturing facility had grown into a new facility at Novi, Michigan, with over 300,000 square feet of space. In 1980 production was expanded to facilities in a suburb in Dallas, Texas.

5. As of September 1981, approximately 90 percent of the facilities Adell Industries had been moved to Sunnyville, Texas, where Adell Corporation is located. Mr. Adell's two brothers have moved to Texas and are running Adell Corporation. Mr. Adell is secretary, treasurer, and 33

percent stockholder of both Adell Industries, Inc. and Adell Manufacturing Inc., Novi, Michigan; president, director and 38 percent stockholder of Adell International, Inc., Novi, Michigan; 50 percent partner in U.S. Product Development Corp., Novi, Michigan; and vice president, director, and 33⅓ percent stockholder in Adell Corporation.

6. Mr. Adell is president, chairman of the board, and 90 percent stockholder of Adell Broadcasting Corporation. He will serve as the general manager, chief financial officer, and chief operating officer of the station on a day-to-day basis (Adell Ex. 6). He proposes to work 40 hours per week at the station. Mr. Adell testified that the amount of time that he spends on this various business interests is "very minimal," which he defined as "approximately 20 hours per week," (Tr. 315, 316). If Adell Broadcasting Corporation is awarded the license here, Mr. Adell will devote only a few hours a week to his other business interests.

7. Mr. Adell became interested in owning a television station in the spring of 1978. He engaged a consulting engineer to ascertain the availability of channels in the Detroit area and learned of the availability of Channel 38, which had been assigned to Mt. Clemens, Michigan.

8. Mr. Adell and his wife will move their residence to Mt. Clemens if Adell Broadcasting Corporation is awarded the Channel 38 grant (Adell Ex. 2, p. 5; Adell Ex. 6).

9. George E. White is vice president, director, and 5 percent stockholder in Adell Broadcasting Corporation (Adell Ex. 3). He currently resides in Detroit, Michigan, and is proposed as the full-time program director for Adell. He is a black male. (Adell Ex. 6).

10. Mr. White was born in Memphis, Tennessee, in 1929. He was educated in the printing trades at the Campbell and Tookes School of Graphic Arts, after which he worked at a Nashville, Tennessee printing firm. At the same time, Mr. White worked as a correspondent for a national weekly black newspaper and operated his own news feature service.

11. In 1951, Mr. White was a member of the staff that organized radio station WSOK (now WVOL) in Nashville. He wrote formats, commercials, and publicity for the station. He also edited a paper called the "SOK News" for WSOK and later became a newscaster and disc jockey with the station.

12. In 1953, Mr. White moved to Cincinnati, Ohio, where he helped organize radio station WCIN. He served at the station as continuity director, newscaster, announcer, and music host. In Cincinnati, he wrote a column for a local black newspaper and established The George White Orchestra.

13. In 1956, Mr. White moved to Detroit to help build WCHB, a black radio station. He served as continuity director, newscaster, music host,

and program director at various times. He became the first program director of sister station WCHD(FM) (now WJZZ) and wrote columns for a local black newspaper.

14. In 1963, Mr. White joined the staff of station WJLB in Detroit as its director of news and public affairs. He was also the music director in charge of the music to be played by the disc jockeys. At the time, he also wrote a column for the *Michigan Chronicle* called "George White at Large."

15. In 1967 and 1968, George White served as general manager of Solid Hitbound Productions, a recording company in Detroit. In 1969, he joined a Detroit advertising agency as senior associate, where he was in charge of developing advertising and public relations campaigns for a number of clients.

16. In September of 1970, Mr. White joined radio station WGPR(FM) in Detroit, as program director. Here, he helped to establish a news department. Thereafter, he helped to establish WGPR-TV, the nation's first black owned-and-operated television station.

17. From 1956 to 1978, Mr. White served as the master of ceremonies for the NAACP Awards Night, which was held in connection with the Freedom Fund dinner. He was involved with the Black United Fund from 1973 to 1980. He also served on the Speaker's Bureau of the Detroit Board of Education and on several committees of the Booker T. Washington Business Association League (Tr. 536-538).

18. Mr. White is a charter member of the Detroit Chapter of National Academy of Television Arts and Sciences and has served on various committees of that organization. He is also a member of the National Association of Television Program Executives and a member of the National Progressive Communicators' Association.

19. In addition to his duties as vice president, director and stockholder of Adell Broadcasting, Mr. White will devote full time to the operation of the television station as its Program Director (Adell Ex. 3; Adell Ex. 6).

20. Ms. Riley was born in 1936 in Detroit, Michigan, where she has lived ever since (Adell Ex. 5). She attended Detroit public schools and Wayne State University, where she received undergraduate and graduate degrees.

21. Ms. Riley has worked as a research assistant in the psychology department at Wayne State University, as an assistant supervisor in the radiological department at the Children's Hospital of Michigan; as an administrative assistant to the Director of Nursing Service, Metropolitan Hospital, Detroit; as a nursing home consultant, a Detroit public school teacher, and as an administrative assistant/assistant hospital director, at the North Detroit General Hospital. She is presently the co-ordinator of the Life/Career Development Lab., University Counseling Services,

Wayne State University, where she is responsible for the administration and co-ordination of a multi-media Life/Career Development Laboratory.

22. Ms. Riley has been involved with the following civic, community, and professional organizations (Adell Ex. 5):

(1) Michigan Personnel and Guidance Association - Member, 1975 to date

(2) American Personnel and Guidance Association - Member, 1975 to date

(3) Delta Sigma Theta Sorority, Inc., Served as fourth Vice-Pres. - Ways and Means Committee (1976) Member, 1975 to date

(4) American College of Nursing Home Administrators - Member, 1970 to date

(5) Association of Non-White Counselors - Member, 1978 to date

(6) American Association of University Professors - Member, 1977 to date

(7) National Association for the Advancement of Colored People - Member for over ten years

(8) Friends of Belle Isle - Member, 1977 to date

(9) Board Member, Sickle Cell Detection Center Member for over five years

(10) Advisory Board Tutorial & Career Committee - Sickle Cell Detection Center (for over five years)

(11) Den Mother - Boy Scouts of America - Member for over five years

(12) American College Personnel Assoc. - Member, four years

(13) Torch Drive Volunteers - Member for over ten years

(14) Trade Union Leadership Council - Member, over 15 years

(15) Black Coalition of Trade Unionists - Member, two years

(16) Women of Wayne (alumni group) - Member for over four years

23. Ms. Riley has been an independent producer at WGPR-TV in Detroit for four years. She has produced three fashion show specials for that station.

24. In addition to her duties as a director and stockholder of Adell Broadcasting Corporation, Ms. Riley will devote full-time to station operations as personnel director. She will change her residence to Mt. Clemens if Adell receives a construction permit (Adell Ex. 5; Adell Ex. 6). Ms. Riley is a black female.

Michigan Channel 38, Inc.

25. Michigan Channel 38, Inc. is a Michigan corporation authorized to issue 10,000 shares of stock (Amended TTC Ex. 4). The following persons have subscribed to Channel 38 stock and/or hold the positions listed:

Shareholder	*Shares of Common Stock Subscribed to*	*Percentage of Stock in the Corporation*
Jerry L. Blocker (Vice President/Director)	1,000	10%
Joseph Ninowski, Jr. (President/Director)	4,500	45%
Jeffrey S. Ninowski (Treasurer/Director)	500	5%
Andrea Edwards (Director)	500	5%
Marshall James Greenspan	307.5	3.075%
Shirley J. Lanier (Vice President)	550	5.5%
Harold Charles MacDonald (Secretary/Director	428.5	4.285%
William H. Mackle	428.5	4.285%
John Obee	428.5	4.285%
Norman A. Pappas	428.5	4.285%
John K. Rye	428.5	4.285%
Karen R. Sikorski	486	4.86%
Richard E. Sikorski	14	.14%
Leo M. Kistner (Director)	0	0%

26. Jerry L. Blocker, Jr., is a black male who resides in Farmington Hills, Michigan. He is proposed to be the general manager of the television station and is vice president, a director, and 10 percent shareholder of Channel 38 (amended TTC Ex. 4). He is a life-long resident of the Detroit, Michigan area. He graduated from Wayne State University in 1953 with a Bachelor of Arts degree in Mass Communications.

27. During the period 1961-1964, Mr. Blocker was the producer of a black history program on WCHB(AM) in Detroit. During that same period, he served as an announcer with WJZZ(FM) in Detroit. In 1964 he became an announcer for WCAR(AM) in Detroit, which he left in 1966 to join WJBK(AM), in Detroit as an announcer.

28. In 1967, Mr. Blocker joined WWJ-TV, Channel 4, Detroit, as a news reporter on the evening news show. In 1975, Mr. Blocker joined WGPR-TV 62, Detroit, as its news director. Here, in addition to serving as news director, Mr. Blocker performed assignment editor duties, had news program production responsibilities and news anchor duties.

29. In 1976, Mr. Blocker did free lance public relations work, and in February 1977, he became Executive Director of the Detroit branch of the National Association for the Advancement of Colored People. In August 1978, Mr. Blocker became the administrative assistant (operations manager) of WJZZ radio in Detroit. In June 1979, Mr. Blocker formed his own public relations and advertising agency, and in the fall of 1980, Mr. Blocker began to teach part time at Wayne County Community College.

30. Mr. Blocker's civic activities have included service on the board of directors of the Detroit Branch of the NAACP (1979 to the present), the Advisory Board of Detroit March of Dimes (1979 to the present), the Advisory Board of American Lung Association of Southeastern Michigan (1979 to the present), the Financial Board of League of Women Voters (1978-1979), the Community Affairs Task Force of the Detroit Urban League (1973-1974), and as Secretary of the Board of Governors of the Detroit Press Club (1973-1975).

31. Mr. Blocker is the vice president and a director of Channel 38 (Amended TTC Ex. 4). If Channel 38 is granted a construction permit, Mr. Blocker will work full-time as its general manager (Amended Macomb Ex. 1; Amended TTC Ex. 4). He will be responsible for the day-to-day operational activities of the station, including decisions regarding programming, news, public affairs, and sales.

32. Joseph Ninowski, Jr., was born on January 4, 1962, in Royal Oak, Michigan. He graduated from Southfield Christian High School in Southfield, Michigan, in 1980, and entered Oral Roberts University in Tulsa, Oklahoma (Amended TTC Ex. 4; Tr. 1245).

33. Mr. Ninowski will work 40 hours per week as co-station manager, with his cousin Jeffrey Ninowski, if Channel 38 is granted the construction permit. Mr. Ninowski was previously employed as a sales-person at Trinity Communications, Inc., during the summer of 1981 and as a general office worker at WBFG, Detroit, for a short period during high school.

34. Jeffrey S. Ninowski was born on December 7, 1959, in Cleveland, Ohio. He graduated from the Detroit Country Day Preparatory School and after two and one-half years at Albion College in southern Michigan, he transferred to the University of Southern California (Amended TTC Ex. 4).

35. Jeffrey Ninowski has never been employed by any television or radio station. Jeffrey Ninowski and his cousin, Joseph Ninowski, Jr., plan to divide responsibilities at the station as co-station managers (Tr. 1186-1187).

36. Andrea P. Edwards is a black female who was born in Pennsylvania and who now resides in the Detroit, Michigan area (Amended Macomb Ex. 2). She assisted in establishing Professional Planners, Inc., in Southfield, Michigan, a corporation devoted to the sale of life and financial

planning services, and for the past twelve years she has served as the bookkeeper and director of personnel of that company. She is now the president of Professional Planners, Inc. (Tr. 1374-1376).

37. If Channel 38 is granted a construction permit, she is to serve as full-time business manager of the station (Macomb Amended Ex. 2). Although Ms. Edwards will retain an ownership interest in Professional Planners, Inc., upon becoming Channel 38's business manager, she will only consult with and review the books of Professional Planners and will not give time there on a day-to-day basis (Tr. 1393-1395, 1406). She will turn over the presidency of that company to someone else (Tr. 1375).

38. Ms. Edwards has been active as a volunteer and donor in Wayne and Oakland counties with the board of directors of the United Foundation (Amended Macomb Ex. 2). She is also on the board of the Boys and Girls Clubs of Metropolitan Detroit, and was vice president of the Boys and Girls' Clubs. She is also a volunteer in the Detroit Art Institute Docent Program.

39. Shirley J. Lanier is a black female who moved to Detroit in 1970 and lived there until 1980, when she moved to Milwaukee, Wisconsin, to join her husband who was traded from the Detroit Pistons to the Milwaukee Bucks of the National Basketball Association (Amended Macomb Ex. 4). Her husband's contract with the Bucks was due to expire in 1983 and both of them had intended to then return to the Detroit area (Tr. 1332-1333). Mr. Lanier's contract with the Bucks apparently has been renewed, and at the time of the hearing, Ms. Lanier was living in Wisconsin (Tr. 1331-1334).

40. Ms. Lanier graduated from high school in Buffalo, New York, and attended the State University of New York at Buffalo from 1965-1968 (Amended Macomb Ex. 4).

41. From 1976-1968, Ms. Lanier was a real estate salesperson, office manager, and bookkeeper of a realty firm known as General Equities Realty and Mortgage, Inc. In 1979, she took a job as vice president of the Commodity Trading Corporation, where she specialized in public relations work with government contract acquisitions.

42. Ms. Lanier performed volunteer work with the March of Dimes and Easter Seals in 1973 and 1974. From 1972-1978, she served as a den mother for the Boy Scouts and participated in programs which aid children and the handicapped (Tr. 1350).

43. Ms. Lanier is proposed as Channel 38's director of public service broadcasting, a position which she will fill on a full-time basis (Amended Macomb Ex. 4). In her mind, there is a distinction between public service programming and public affairs programming. In her view, public service emphasizes community lifestyles, while public affairs emphasizes community issues (Tr. 1335). Some of her duties will consist of assisting the

general manager in the development of public affairs programming (Amended Macomb Ex. 4; Tr. 1469-1472). Some of her duties as director of public service broadcasting are yet to be determined (Tr. 1364).

44. Karen R. Sikorski resides in West Bloomfield, Michigan. She has worked as a clerk typist, keypunch programmer with the Arlington County Public School System. In 1974, a business transfer brought her family to Michigan. She began attending Wayne State University part-time in September 1978 as a communications major. She has been a volunteer with a local non-profit theatre group. If Channel 38 receives the construction permit, Ms. Sikorski will devote 20 hours per week to the operation of the station as its assistant director of programming (Amended Macomb Ex. 3).

Comparative Coverage

45. Adell's coverage would provide a new and sixth television service to 81,033 people and to 494 square miles including 55,160 people and 371 square miles which would not be served by Channel 38 (Adell Ex. 10). Adell's proposal provides for service to 4,237,883 people in common with Channel 38's proposal.

46. Channel 38's coverage, the same as that previously used by TTC, would provide a new and sixth television service to 80,556 people and 246 square miles including 54,683 people and 123 square miles which would not be served by Adell (Adell Ex. 10). Channel 38's proposal provides for service to 4,237,883 people in common with Adell's proposal.

Auxiliary Power Supply

47. Channel 38 will obtain for emergency operation of the proposed television station a generator of sufficient capacity to allow it to continue broadcast service uninterrupted in an emergency at substantially full power for an indefinite period (Amended TTC Ex. 4).

Diversification of Ownership of Mass Media

48. Neither applicant, nor any of its shareholders, possess any ownership interest in other broadcast television, radio, CATV, newspaper, or other media (Amended TTC Ex. 4; Tr. 310, 535, 662).

Rule 1.65 Issue Against Adell

49. By Order FCC 82M-0423, released February 9, 1982, the following issue was added against the application of Adell Broadcasting Corporation:

> "To determine whether Adell Broadcasting Corporation has violated Section 1.65 of the Commission's Rules by failing to report the elections of James Panagos and Dominick Carnovale to Adell's board of directors, and if so, the effect on its basic and/or comparative qualifications."

The issue was added at the instance of Trinity Television Corporation and Macomb Broadcasting Company, acting through their joint motion filed October 26, 1981. Then, later, by their jointly filed petition to enlarge issues of May 27, 1982, Trinity and Macomb, relying on testimonies of various Adell principals on the 1.65 issue "taken between May 10 and 12, 1982, together with Adell's interrogatory responses of December 17, 1980, the deposition testimony of Adell's principals on May 19, 1981, their hearing testimony on September 28-30, 1981, their further deposition testimony on April 13, 1982 and their various written submissions," requested a misrepresentation and/or lack of candor issue against Adell, namely, the following:

> "To determine whether the principals of Adell Broadcasting Corporation engaged in misrepresentation and/or lack of candor in their testimony concerning the identity of certain Adell directors, the circumstances surrounding the election of those directors and the subsequent nullification of that election, and the circumstances under which Adell failed to report same to the Commission, and if so, the effect on Adell's basic and/or comparative qualifications."

The request for this issue was denied by Order FCC 82M-2546, released August 24, 1982. Now, in proposed findings, Channel 38 continues its effort to inject the rejected issue into this case, arguing that the issue is intimately bound up with the Section 1.65 issue added against Adell. Channel 38 explains as follows:

> "The proposed findings of fact set forth herein relate to two separate legal issues: Adell's violation of Rule 1.65 *and* Mr. Adell's misrepresentations and/or lack of candor throughout this proceeding. The second legal issue derives for the most part—but not entirely—from hearing testimony, affidavits, interrogatory responses and deposition testimony related to the violation of Rule 1.65, and so the proposed findings covering it are combined with the proposed findings on the Rule 1.65 issue." (Channel 38 Proposed Findings, p. 28, fn. 3).

50. There was a stockholders meeting of Adell Broadcasting Corporation on February 7, 1981, at the home of Mr. Franklin Z. Adell, in Birmingham, Michigan. This meeting resulted from what had begun as an informal social gathering (Adell Ex. 12). Those in attendance were: Franklin Adell, Sharon Adell, Ruth Riley, George White, Jim Panagos, and Dominick Carnovale. At that meeting, the following persons were unanimously elected, as suggested by Mr. Franklin Adell, to serve as directors until the next annual meeting or until their respective successors were elected and qualified: Franklin Adell, Sharon Adell, Dominick Carnovale, James W. Panagos, Jr., R. Antoinette Riley, and George E. White (Tr. 1928, 1933).

51. Immediately after the shareholders meeting adjourned, a meeting of the board of directors took place. Those in attendance were: Mr. Adell, Mrs. Adell, Mr. Carnovale, Mr. Panagos, Mr. White, and Ms. Riley (TTC Ex. 16). The board elected Mr. Adell as chairman and chief executive officer, Mrs. Adell as secretary and treasurer, and Ms. Riley as assistant

recording secretary. Prior to the election of these directors, and at the same meeting, an amendment of the by-laws of the corporation carried unanimously. That amendment established the number of corporate directors at not less than, and not more than, six. The number of authorized directors had been increased, and Panagos and Carnovale had been elected to Adell's board of directors; these changes were never reported to the Commission (Tr. 531; Order FCC 82M-0423).

52. Later on during the month of February, 1981, Mr. Adell called Ruth Riley and George White, using his telephone conference instrument (Adell Ex. 12). The purpose of the call was to reach a decision to terminate the services of Messrs. Panagos and Carnovale as directors. Mr. Adell told Riley and White that he had given some thought to the matter of having Messrs. Carnovale and Panagos on the board and that, in his view, having them on the board would serve little purpose. Riley and White agreed, and the decision was made by the three of them to thenceforth consider Carnovale and Panagos as non-board members. In this conversation, they also agreed that when and if Adell Broadcasting Corporation was awarded the construction permit, they would at that time consider making Mr. Panagos a director, if he would become the full-time sales manager for the station (Adell Ex. 12; Tr. 669). Neither Mr. Panagos nor Mr. Carnovale attended a board meeting either before or after the February 7, 1981 meeting.

53. All three of the Adell stockholders testified that it was their view that before Mr. Panagos and Carnovale would "officially" become directors, the Adell application would have had to have been amended (Tr. 358; Tr. 554, 668). Mr. Adell's testimony concerning his belief that Panagos and Carnovale never became directors of Adell Broadcasting is quite confused and lacks a certain symmetry. Adell claimed, "I knew all along that he wasn't a director because you have to amend the application to make him a director" (Tr. 358, 349, 355, 359, 364). And in deposition testimony given in May of 1981, Mr. Adell testified that Mr. Panagos *was* a director (Tr. 360-364). This deposition testimony was given only two months after the February 7, 1981 election. When Mr. Adell was asked to explain his deposition testimony in which he stated that Panagos *was* a director, Adell answered, "I made a mistake in saying that . . . . He was never a director. I never believed that he was a director. I wanted him [at] a future date to be a director" (Tr. 364).

54. Mr. Adell testified for the last time in September 1982, and he was confronted with his April 1982 deposition testimony in which he stated that Mr. Panagos and Carnovale *were* elected directors on February 7, 1981 and that he considered them to be directors on that date and on days following (Tr. A2097-2098).

55. In explaining the reasons why it was determined to recind the elections of Panagos and Carnovale, Mr. Adell testified that it was "because we did not want to amend the application" (Tr. 355); "we didn't want to make him a director and amend the final amendment" (Tr. 358); "I didn't want to amend the application" (Tr. 359); "I didn't want to change the application" (Tr. 516); "I would have notified the Commission if I wanted to change the application" (Tr. 518); "It was bothering me to the point where I didn't want to amend this application" (Tr. 1760); and "I wanted to leave the application as it is" (Tr. 1901).

56. Ruth Riley testified that Franklin Adell mentioned to her that there was a deadline at the Commission for the reporting of changes such as occurred here, and "it was felt that we would not have time to possibly make that deadline . . . . " (Tr. 1966-1968). Mr. Adell denied that recinding the February 7 changes had anything to do with the need to report the matters to the Commission in a timely fashion (Adell Ex. 12; Tr. 1906). Ms. Riley admitted that after the February 7 meeting, Adell had received advice from counsel that "we were spinning our wheels in a sense," and that there was no way they could meet the "deadline" for the changes made on February 7, 1981 (Tr. 2034, 2337), apparently having reference to the Section 1.65 30-days deadline for reporting significant changes.

57. For its position that misrepresentation/candor findings should now be made concerning the testimony of Franklin Z. Adell about the matter, Channel 38 relies on the general proposition that candor is always at issue in Commission proceedings. It cites *Grenco, Inc.*, 39 FCC 2d 732 (1973), and *William M. Rogers*, 52 RR 2d 831 (1982), and *Radio Carrollton*, 69 FCC 2d 1139 (1978), the latter holding that "no specific misrepresentation or lack of candor issues are needed to consider these matters, since the Commission always has the authority to deny a license or application where the record reveals such misconduct."

58. The efficacy of such a general proposition in Commission proceedings is undoubted. But neither is there doubt about the mischief to be made if the general proposition is permitted to be used as a device to encourage "flyspecking" of an opponent's case after it has been presented, or if it causes unbridled revisiting of earlier and failed attempts to gain specification of issues not meaningfully dissimilar from issues pressed in proposed findings at the conclusion of the case. Given the ingenuity of counsel and the zeal with which they urge their causes, it will be the rare case in which witness testimony cannot be subjected to attack (however frivolous in fact) at the conclusion of the case on grounds that the witness lied or was less than forthcoming in his testimony. Then, comfortable with the unarguable generalization that "truth and candor are always at issue in Commission proceedings and no special issue is necessary", seeming obstacles are swept away and "flyspecking" of testimony given at

hearing, at deposition, in answers to interrogatories, and in affidavits accompanying pleadings, and any other utterance of the witness are attempted to be given a significance far beyond what a dispassionate view of the facts can accept. That is Channel 38's tactic in this case. It "flyspecks" Mr. Adell's testimony given at hearing, compares it with affidavits submitted in opposition pleadings, and with interrogatory responses, and with Adell's construction permit application, and anything else it can find, and concludes that Mr. Adell has lied or has been less than candid with the Commission.

59. Channel 38 relies on 13 alleged instances of "misrepresentation and lack of candor by Mr. Adell." They are: (1) the existence of post-February 7, 1981 informal shareholder meetings at which actions were taken; (2) Mr. Adell's recollection of the post-February 7, 1981 informal shareholder meeting; (3) Mr. Adell's failure to reveal the existence of the post-February 7, 1981 informal shareholders meeting; (4) Mr. Adell's testimony about whether Messrs. Panagos and Carnovale were ever directors of Adell Broadcasting; (5) the reasons why Mr. Adell did not consider the February 7, 1981 election of Messrs. Panagos and Carnovale as directors to be effective; (6) the reasons for nullifying the February 7, 1981 election of Messrs. Panagos and Carnovale as directors; (7) the location of Adell shareholder and director meeting minutes and Mr. Adell's knowledge thereof; (8) existence of Adell shareholder and director meeting minutes and Mr. Adell's knowledge thereof; (9) Mr. Adell's response to interrogatories asking about the existence of a particular document; (10) Adell's response at hearing to a question about an earlier discovery request; (11) Mr. Adell's testimony concerning whether Mr. Panagos ever held any corporate position with Adell Broadcasting; (12) claimed misrepresentations by Mr. Adell concerning Adell's staffing plans; and, finally, (13) a claimed misrepresentation in an amendment of the application concerning which of the Adell principals conducted certain ascertainment interviews.

60. Apart from the irrelevancies contained in that listing, it plainly represents nothing more than an attempt to reargue a position long ago considered and rejected (see, Petition to Enlarge Issues, filed jointly on May 27, 1982 by Macomb Broadcasting Company and Trinity Television Corporation and Order FCC 82M-2546, released August 24, 1982, denying the requested issue). The misrepresentation/candor matter now urged by Channel 38 is not an issue in this case and no findings will be made here on any of it. The principle that "truth and candor are always at issue in Commission proceedings" can have no application in these circumstances.

Rate Card Issue Against Channel 38

61. An issue was added to determine whether Trinity Broadcasting Corporation (TBC), 100 percent owner of Trinity Television Corporation,

and former licensee of radio stations WBFG, Detroit, Michigan, and WQMS, Hamilton, Ohio, misrepresented the areas and populations served by those stations in promotional coverage maps distributed to the public, advertisers, and the Commission, and if so, the effect thereof on the comparative qualifications of Trinity Television Corporation.

62. Trinity Broadcasting Corporation filed an application for Channel 38 on January 30, 1979. On May 29, 1979, the application was amended to substitute Trinity Television Corporation for TBC as the applicant. At that time, TTC was a wholly-owned subsidiary of TBC. TBC was owned 90 percent by Joseph Ninowski, Sr., and 10 percent by Daniel Ninowski, Sr. (TTC Ex. 5, Att. A). On May 8, 1981, the application was amended to transfer control of TTC from TBC to Joseph Ninowski, Jr. and Jeffrey S. Ninowski (Adell Ex. 8, p. 1).

63. TBC was the licensee of radio station WBFG(FM) (now WLLC), Detroit, Michigan, from January, 1962 to May, 1980. TBC also held the license of radio station WQMS(FM) (now WLWS) Hamilton, Ohio, from August, 1972 to July, 1977 (Adell Ex. 8, p. 1). The rate cards at issue were used at WBFG and at WQMS while Joseph Ninowski, Sr., and Daniel Ninowski, Sr., owned those stations.

WQMS Ratecard Effective June 1, 1972

64. This card includes a coverage map showing an unlabelled circle. Above the map, in large print are the words "Coverage Map". Below the map is the following statement: (Adell Exhibit 8, Page 2, Appendix I):

> "WQMS covers an area of approximately 85 miles radius. This includes a population coverage of approximately 2 million in the primary coverage area and approximately 3½ million in the secondary coverage area."

WQMS Ratecard Effective October 1, 1974

65. This card includes a coverage map containing two unlabelled concentric circles, one with a radius of approximately of 52 miles and the other with a radius of approximately 70 miles. The rate card map is labelled "Coverage Map". Below the map is the following statement (Adell Ex. 8, p. 2 and Appendix I):

> "WQMS covers an area of approximately 85 miles radius. This includes a population coverage of approximately 2 million in the primary coverage area and approximately 3½ million in the secondary coverage area."

During all pertinent times, the predicted coverage maps from the Commission's files showed 60 dBu (1 mV/m) contours at distances ranging from approximately 26.6 miles to approximately 33 miles from the antenna site. (Adell Ex. 8, Appendix II).

WBFG Ratecard Effective September 1, 1967

66. This rate card includes a map identified as a "Coverage Map", with an unlabelled circle. Below the map is the following legend:

> "WBFG covers an area of approximately 120 miles radius. This includes a population coverage of approximately 4¼ million in the primary coverage area and approximately 10 million in the secondary coverage area. Based on a 1960 census including towns of 10,000 or more population.

WBFG Ratecard Effective June 1, 1972

67. This ratecard contains one unlabelled circle on what is identified as a "Coverage Map" and the following legend:

> "WBFG covers an area of approximately 100 miles radius. This includes a population coverage of approximately 5½ million in the primary coverage area and approximately 12 million in the secondary coverage area. Based on a 1970 census including towns of 10,000 or more population."

WBFG Ratecard Effective July 1, 1975

68. This ratecard is identified as a "Coverage Map" and includes two unidentified concentric circles, and bears the same legend as the June 1, 1972 Ratecard Map. The innermost of these unidentified contours has a radius of approximately 56 miles, and the outermost has a radius of approximately 72 miles (Adell Ex. 8).

69. The WBFG engineering map on file with the Commission shows the station's 1 mV/m contour at a distance of approximately 35 miles from the transmitter site. WBFG's license history cards during the period of TBC ownership reveals that the station operated at a relatively constant effective radiated power and height above average terrain and from the same site, thereby assuring that the map accurately reflected the station's coverage in 1967, 1972, and 1975 (Adell Ex. 8, p. 5, Appendix V).

70. E. Harold Munn, Jr., President of E. Harold Munn, Jr., and Associates, a broadcast engineering consulting firm in Coldwater, Michigan, testified on behalf of Adell. He is familiar with the Rules relating to FM Broadcast Stations and the computation of distances to determine the proper location of predicted service contours.

71. Mr. Munn examined copies of the WQMS, Hamilton, Ohio, predicted coverage maps from the Commission's files dated November, 1964, and submitted with a dual-identification request in March, 1975 and June, 1976. In each case, the placement of the 60 dBu (mV/m) contour at a distance ranging from approximately 26.6 miles to approximately 33 miles from the antenna site appeared consistent with the rules applicable at the time and to fairly represent the defined service area of the station.

72. Mr. Munn prepared the technical showings for the relocation of WBFG to its site in Detroit from an earlier location in Allen Park, Michigan. Using the then applicable rules, the 60 dBu contour was computed to virtually a circle, ranging between approximately 31 and 32.8 miles from the antenna location (Adell Ex. 8, Appendix III, p. 1).

73. Mr. Munn examined the June 1, 1972 WBFG coverage map. The coverage within the unlabelled contour is shown as a perfect circle having a radius of approximately 90 miles. The text describes a coverage radius of "approximately 100 miles radius". Cities lying beyond the 60 dBu contour are included within this radius, including Jackson, Lansing, Flint, Saginaw, all in Michigan, and Toledo, Lorain and Sandusky, all in Ohio.

74. Mr. Munn also examined the July 1, 1975 WBFG rate card and the map contained therein. The coverage map showed two (2) unidentified contours, the innermost having a radius of approximately 56 miles and the outermost having a radius of approximately 72 miles. Flint and Port Huron, Michigan, and a portion of Toledo, Ohio, appear within the innermost circle. Each of these cities is outside the 60 dBu contour of WBFG.

75. Mr. Munn testified that the contours used by TBC on its rate cards were incorrect because they showed and claimed coverage outside of the one millivolt (60 dBu) contour (Tr. 737). He explained that although there is service beyond the one millivolt (60 dBu) contour in many instances, the coverage will vary depending on interference, location, and other channel conditions. The coverage will not be uniform in all directions (Tr. 743, 338, 782). It was his view that only the 60 dBu contour (1 mV/m) should be used in connection with promotional maps to depict the coverage of a station. Anything else should be referred to as secondary service, subject to interference (Tr. 783).

76. Mr. Richard L. Kennedy testified on behalf of TTC. Mr. Kennedy was associated with TTC or TBC since early 1970 (TTC Ex. 6, p. 1), and since 1971 has served as Vice President of Engineering and Development of TTC/TBC. From April until December 1981, Mr. Kennedy was a director of TTC. During that period he worked full-time for TCC/TBC, and Daniel Ninowski was in operational control of WBFG as well as WQMS. Mr. Kennedy testified that TBC was unaware of the necessity to have rate cards, coverage maps or other advertising material depicting station coverage conform with the engineering on file with the Commission until its Program Director, Jack Myckva, attended a NAB legal seminar in July of 1978 (TTC Ex. 6).

77. Kennedy claimed that since he knew nothing about the requirements governing rate cards and coverage maps, he never brought the matter to Daniel Ninowski's attention. After Mr. Myckva informed he and Daniel Ninowski about what had been learned at the NAB seminar, he checked the coverage map on WBFG's current rate card with the engineering on file with the Commission, and determined that it was not strictly in conformance with the engineering on file. Mr. Kennedy then plotted a new contour for inclusion on a new rate card. This rate card was

prepared by Mr. Kennedy between July 31 and September 27, 1978 (Tr. 1600).

78. Even though Mr. Kennedy was the Vice President in charge of engineering for TBC at the time the rate cards with unlabelled circles were being distributed by WQMS and WBFG, he claimed to know little, if anything, about them. He claimed that he did not know who was responsible for the unlabelled outer circle on the rate cards (Tr. 1608, 1638, 1639, 1643). Although he knew TBC had rate cards, and probably knew there were coverage maps on them for both WQMS and WBFG, he claimed that he had not given any thought to whether the rate cards depicted accurate coverage. He felt that he had no obligation to look at the coverage maps to ascertain whether they fairly represented the coverage of the stations (Tr. 1645-47). There was no question in Kennedy's mind that the WQMS June 1, 1972 rate card was prepared for TBC to be used for advertising purposes.

79. The WBFG rate card effective June 1, 1972 was probably seen by Kennedy, but he denied responsibility for the unlabelled circle claiming coverage of 100 miles radius (Tr. 1643). Also, Kennedy claimed to know very little about the coverage claimed on the WBFG July 1, 1975 rate card, even though he was the chief engineer of station at the time (Tr. 1657-1659).

Section 307(b) Issue

80. Both applicants propose to construct a station having an effective radiated power of 5 mega Watts and an antenna height above average terrain of 416 feet (Joint Ex. 1, p. 1). Adell specified Mt. Clemens as its community of license, and Channel 38 specified Warren, Michigan.

81. The Grade B contours of Detroit VHF stations WJBK-TV, WDIV and WXYZ-TV completely enclose the composite area served by both applicants. Some portions of the composite area (served by the applicants) for Channel 38 receive as many as 12 existing services, and no area receives less than three existing services (Joint Ex. 1, p. 3).

82. Mt. Clemens lies wholly within a region having six television services, and the City of Warren also lies within a region having six television services (Joint Ex. 1, p. 5). Additionally, 57 percent of the City of Warren lies within the Grade B contour of WTOL-TV, Channel 11, Toledo, Ohio. The City of Warren lies wholly within the 80 dBu contour (principal community) of Adell, and the City of Mt. Clemens lies wholly within the 80 dBu (principal community) contour of Channel 38, Inc. The Detroit urbanized area includes both the cities of Warren and Mt. Clemens (Joint Ex. 1).

83. The areas and populations within the Grade B contours of the applicants are shown below:

TABLE I

	By Adell	*Channel 38*
United States Population Within Grade B Contour	4,318,916	4,318,439
United States Land Area Within Grade B Contour (sq. miles)	3,196	2,948
New Television Service Provided to Population	19,018	6,974
Area (sq. miles)	89	56
5th Television Service Provided to Population	772	590
Area (sq. miles)	15	9
6 or More New Television Service Provided to Population	4,299,126	4,310,875
Area (sq. miles)	3,092	2,893

An analysis of the area common to all applicants shows the following:

New Television Service Provided	*Population*	*Area (Sq. /Miles)*
4th	6,974	56
5th	590	9
6th or More	4,230,319	2,637
Total	4,237,883	2,702

An analysis of the uncommon areas shows the following:

New Television Service Provided By	*Population*	*Area (Sq. Miles)*
A. *Adell:*[1]		
4th	12,044	33
5th	182	6
6th or More	68,807	455
Total	81,033	494
B. *Channel 38:*[2]		
6th or More	80,000	
C. *Adell But Not Channel 38:*		
4th	12,044	33
5th	182	6
6th or More	42,934	332
Total	55,166	371
D. *Channel 38 But Not Adell:*		
6th	54,683	123

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[1] Analysis includes data concerning Macomb's proposal.

[2] Analysis includes data concerning Macomb's proposal.

84. The principal industries in Mt. Clemens include the Ford Motor Co. and Savin Industries Plants, as well as pottery, greenhouses, metal products, plastics and pleasure boats (TTC Ex. 1, p. 9). Approximately 180 manufacturers are located within Mt. Clemens (Macomb Ex. 7, pp. 7-29). Mt. Clemens is served by two banks, the First National Bank and the Mt. Clemens Bank, having combined assets of $375,663,000 (TTC Ex. 1, p. 9). Mt. Clemens has approximately 18 major retail outlets. Mt. Clemens' tax base is 42 percent commercial.

85. The educational needs of Mt. Clemens residents are supplied by elementary, two junior high and one senior high schools. Macomb County Community College Center Campus is located in Mt. Clemens (TTC Ex. 1, Att. C, p. 1), with a present student enrollment of about 7,000 (Tr. 945). Mt. Clemens also has three private or parochial schools and three public libraries (TTC Ex. 1, p. 10). Health care for Mt. Clemens residents is supplied by three separate facilities within the community, St. Joseph Hospital, Mt. Clemens General Hospital, and Martha T. Berry Memorial Medical Facility (TTC Ex. 1, p. 10). Two other hospitals are located in Clinton and Harrison townships (Tr. 984). Mt. Clemens has 164 full-time city employees (Macomb Ex. 7, p. 6), employs 36 full-time police officers and 23 full-time firemen, and has six public parks on 104 acres of city parkland (TTC Ex. 1, p. 10).

86. The *Macomb Daily* newspaper is published in Mt. Clemens six days per week, and Mt. Clemens has two radio stations licensed to it serving community needs: WBRB(AM) 1430 kHz 500 W of power day and night, and WLBS(FM), 102.7 mHz 40,000 W day and night.

87. Mt. Clemens has an art center which provides displays, exhibits in ceramics, painting and other crafts. Mt. Clemens has a symphony orchestra (TTC Ex. 1, p. 11). Approximately 24 civic, fraternal and charitable organizations serve Mt. Clemens residents (Adell Ex. 7, pp. 28-46).

88. Because it is the county seat, many of the county's agencies have offices in Mt. Clemens, and some 71 organizations have offices in Mt. Clemens (Macomb Ex. 7, pp. 34-35). Mt. Clemens depends upon Detroit for its water and for its dry weather sewage treatment (Tr. 867).

89. Mt. Clemens is served by two dailies from Detroit, *The Detroit News* and *The Detroit Free Press*, both of which are published seven days each week.

90. There are no television stations licensed to Mt. Clemens. The residents of Mt. Clemens receive service from radio and television stations located in the Detroit metropolitan area.

91. Four non-party individuals testified concerning Mt. Clemens and its need for a television facility. *Charles Dennis*, a former Catholic priest who is currently an educator, has lived and worked in both Mt. Clemens

and Warren. He testified that Mt. Clemens is the center of the North County area encompassing both rural and urban populations. He testified that Warren, on the other hand, is in many respects indiscernible from Detroit. It borders Detroit on Eight Mile Road, so that one can cross into Warren without realizing one has done so.

92. *Edwin Whedon,* the City Manager of Mt. Clemens, testified concerning the extensive urban renewal program; the building of new homes, apartment complexes and office buildings; and the "rebirth" of Mt. Clemens in the last two years. In Mr. Whedon's opinion, a television station would be an ideal independent source of city and county news that could give on-the-spot coverage to major regional decisions as they unfold.

93. *David L. Walters,* executive vice-president of the Central Macomb County Chamber of Commerce, testified concerning urban rehabilitation, and revitalization of Mt. Clemens' downtown area, and the growth of local industry. In 1970, the Mt. Clemens area encompassed 38 percent of the industrial and commercial acreage in Macomb County; today, it is estimated at 43 percent.

94. *Gebran Anton* testified that Mt. Clemens has undergone major changes since the early 1960's, a period of urban renewal. Mr. Anton believes that a television station in Mt. Clemens would help an already thriving business area by attracting additional businesses and making a new advertising outlet available to existing retailers (Macomb Ex. 11, p. 2).

95. *Kathleen Thomson* is a Sister of Charity of Cincinnati, employed as Community Relations Director at St. Joseph Hospital in Mt. Clemens. Sister Thomson believes that it would be especially helpful to have a television station in Mt. Clemens, the county seat, where the area of concern would not begin and end with the city limits, but, rather, would run the length and breadth of Macomb County, which is the third most populous County in the state.

The Community of Warren, Michigan

96. The 1980 Census shows Warren, Michigan, having a population of 161,134, making it the third largest city in the State of Michigan and the largest city in Macomb County (TTC Ex. 1, p. 1). Warren's 1970 population was 179,260, so its 1980 population of 161,134 represents a net loss of 10.1 percent from the 1970 population figure (TTC Ex. 1, Att. D, p. 1). The City of Warren encompasses approximately 34.5 sq. miles. It borders the City of Detroit on a long, continuous boundary known as Eight Mile Road (Macomb Ex. 13, p. 2). Warren is in the Detroit urbanized area (Joint Ex. 1).

97. The City of Warren has established its government on the two-tier mayor/city council model. The city currently has 171 full-time firemen, 235 full-time policemen, four police cadets and a 56-member police reserve

force (TTC Ex. 1, p. 2). Sewage and refuse collection is provided by the City of Warren, while water is supplied by the City of Detroit. Warren has an annual budget of $58,674,000.

98. Warren has 23 public parks totalling in excess of 300 acres for use by its citizens. Warren also has its own education system, consisting of six public school districts, all of which have their own administrative staff, teachers, board of education, physical facilities and tax rates. They consist of the Warren Consolidated Schools, which has four high schools, nine junior high schools and 28 elementary schools and a career preparation center; the Warren Woods District, which has two elementary schools, the Van Dyke School District, having one high school, one junior high, and eight elementary schools; the East Detroit Schools, having one high school, three junior high schools and eight elementary schools; the Center Line School District, having one high school, three junior high schools and four elementary schools; the Fitzgerald School District, having one high school, one junior high, and three elementary schools, and five private and parochial schools (TTC Ex. 2, pp. 5-6). The school districts have a combined enrollment of approximately 67,000 students (TTC Ex. 3, p. 2). Higher education is offered at Macomb County Community College, South Campus, with an enrollment of over 25,000 (TTC Ex. 2, p. 3; TTC Ex. 3, p. 2).

99. The Warren Public Library has five branches throughout the city, and medical needs are provided for by four hospitals, separate poison control facilities and three nursing homes; an emergency squad; ambulance service and emergency helicopter service (TTC Ex. 1, p. 6).

100. A 10 watt noncommercial educational Radio Station, WPHS (FM), is located in Warren (TTC Ex. 1, p. 6).

101. The General Motors Technical Center is located in Warren, and employs about 22,000 workers. Other General Motors' facilities located in Warren include: Chevrolet Manufacturing, Fisher Boad, Central Engineering and Ternstedt. In addition, over 1,500 other manufacturers produce over 2,000 classes of products for auto production. In total, the public and private sectors of Warren employ approximately 85,000 persons, 25,000 of which are residents of Warren (TTC Ex. 1, p. 7).

102. Warren has three banks, four savings and loan institutions and one credit union with total assets in excess of $378,022,000 (TTC Ex. 1, p. 8). The tax base of Warren is made up of approximately 51 percent commercial and industrial, and approximately 49 percent residential.

103. Macomb Ex. 13 is the statement of Dr. Barbara Everitt Bryant, a Research Analyst who conducted a study of the degree to which the residents of Warren utilized the facilities of, and otherwise identify with, the City of Detroit, Macomb County, and other areas outside of Warren (Tr. 1046). The study characterizes Warren as a "semi-bedroom communi-

ty" (Macomb Ex. 13, p. 13), because two-thirds of its work force works outside the city (Tr. 1108).

104. Dr. Bryant testified that Warren is largely "a creature of the outward migration of the white population from Detroit," based on the facts that the Detroit population declined and Warren's population increased during the last twenty years (Tr. 1118), and that Detroit had a 63 percent black population in 1980, while Warren's population was only .2 percent Black (Tr. 1118).

105. The study showed that in 21 percent of Warren households, either the head of the household or the spouse is employed in the City of Detroit, and in 1 percent both are employed there. Detroit is thus the employment site for 22 percent of Warren's households (Macomb Ex. 13, Att. B, p. 3). In 29 percent of the households either the head of the household or the spouse works within the City of Warren, and in 4 percent of the households both do. Thus, Warren is an employment site for 33 percent of Warren households.

106. Most Warren households read the Detroit metropolitan newspapers. In a week, 66 percent of the households read the *Detroit News* and 51 percent read the *Detroit Free Press*. Warren does not have a newspaper of its own (TTC Ex. 1, p. 6).

Conclusions of Law

Section 1.65 Issue against Adell

107. Rule 1.65 of the Commission's Rules states that:

> "Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate."

108. Where a corporate applicant has made a change in its officers or directors, Rule 1.65 generally requires that the change be reported to the Commission. *Pacifica Foundation*, 41 FCC 2d 71 (Rev. Bd. 1973). It is true that Adell Broadcasting failed to report a change in its by-laws and the elections of James Panagos and Dominick Carnovale to its board of directors. And it is clear enough that these gentlemen were in fact elected to the board of directors, notwithstanding the belief of the Adell principals, and that particularly of Mr. Adell, that the effectiveness of their elections was somehow dependent upon the reporting of the matter to the Commission.

109. The weight of the evidence on the point indicates that the elections of Panagos and Carnovale were rescinded by agreement reached by the three Adell principals in a three-way telephone conference call

placed by Mr. Adell in the month of February, 1981, the same month in which the elections of Panagos and Carnovale took place.[3] The issue, then, is one involving the failure to report to the Commission an action which has been rendered nugatory within the 30-day reporting period. Channel 38 urges that Adell Broadcasting nevertheless had an obligation to report the action which Adell rescinded within that 30-day period. Channel 38 relies on *Radio Ridgefield*, 58 FCC 2d 134 (Rev. Bd. 1976), a case in which an applicant contended that it was not required to report a second vote by a town board of selectmen which rescinded an earlier first vote that formed the basis for the applicant's assurance of transmitter and antenna site availability. It is entirely clear, however, that the case does not involve the rescision by an applicant, within the 30-day reporting period, of an action taken by that applicant. The case does not support the proposition, urged by Channel 38, that an applicant has a duty to report an action taken by the applicant and rescinded by the applicant with 30 days of the time the action is taken. Perhaps Adell did have a duty to report these matters. But the breach of that duty in the circumstances presented here is technical in the extreme. It is difficult to imagine the use which the Commission or the parties would or could have made of the knowledge which would have been gained by Adell's reporting the elections of Panagos and Carnovale, and the subsequent rescission of those elections only a short time later.

110. Even if Adell Broadcasting could be said to have had a duty to report the change in its by-laws and the consequent elections of Panagos and Carnovale to its board of directors, the failure to have reported these matters is utterly without decisional significance. Neither Panagos nor Carnovale held stock in Adell Broadcasting. Whether or not they were directors of the corporation would in no way affect the integration proposal of Adell. Their election as directors did not result in a change in either ownership or in proposed owner-management integration.

111. Finally, there is no showing that Adell attempted to conceal facts or to mislead the Commission. The matters not reported are simply too minor in nature to support a claim that concealment or misrepresentation was involved or even attempted. Not even a minor comparative demerit will be assessed against Adell on this account.

Ratecard Issue Against Channel 38

112. The 1972 and 1974 WQMS rate cards were misleading. Both represented that WQMS covered an area of approximately 85 miles radius, while the maximum distance to the WQMS 1.0 mV/m contour was

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[3] Both Franklin Adell and Ruth Riley placed the time of the conference call as February, 1981. James Panagos testified that Ms. Riley told him about the call on the day that it took place, which he believed was "4, 5, 6 weeks" after February 7.

about 33 miles. Additionally, the claim that WQMS served a population of approximately 2 million in some a "primary" coverage area and 3½ million in some "secondary" coverage area was a large exaggeration.

113. The 1967, 1972, and 1975 rate cards of WBFG were also misleading. The map on these cards appeared to represent that WBFG covered an area anywhere from 72 miles (1975 rate card) to 120 miles (1967 rate card). In fact, the engineering maps on file with the Commission showed the station's 1 mV/m contour at a distance of approximately 35 miles from the transmitter site. Additionally, the claim that WBFG served a population of 4½ to 10 million people was a very large exaggeration.

114. The WBFG rate cards listed many cities which were located well beyond the station's 1 mV/m contour. The total population of the entire state of Michigan in 1970 was less than 9 million persons; yet, the map purported to depict WBFG coverage of approximately 12 million persons.

115. The person or persons responsible for preparing the rate cards, or for writing the text on the rate cards, is not known. There is no showing that the cards were intentionally deceptive. The evidence shows that as soon as TBC became aware of the exaggerations on the rate cards, it immediately set about to correct the situation by publishing an accurate card bearing an accurate coverage map. This was not done until sometime in 1978. During the years in question (1967-75), TBC had an undoubted obligation to take reasonable steps to insure that the coverage claims on the rate cards were accurate. It obviously did not do so. No comparative demerit will be assessed, however. The responsible principals are now deceased, and the Commission has considerably de-emphasized the importance of this kind of matter in its proceedings. *Elimination of Unnecessary Broadcast Regulations: Policy Statement and Order*, FCC 83-339, released August 2, 1983.

Section 307(b) Issue

116. The Grade B signal of Adell's proposed station encompasses 4,318,916 people within a 3,196 square mile area of the United States. Channel 38's Grade B signal encompasses 4,318,439 people within a 2,948 square mile area of the United States. Neither Adell nor Channel 38 will provide first, second, or third Grade B signal coverage to any area. Adell would provide a fourth Grade B television signal to an area of 89 square miles with a population of 19,018, and a fifth Grade B signal to an area of 15 square miles with a population of 772. Channel 38 would provide fourth Grade B signal to 6,974 people in a 56 square mile area, and a fifth Grade B signal to 590 people in a nine square mile area (Joint Ex. 1).

117. Adell's proposed station will serve .01 percent more population and 8.4 percent more area than Channel 38's proposed station. Adell will provide a fourth Grade B signal to 33 square miles and 12,044 more people

than will Channel 38. Adell will provide a fifth Grade B signal to six square miles and 182 more people than Channel 38. These differences are small and neither applicant proposes to bring service to underserved areas or populations. Neither applicant deserves a preference under the reception needs aspect of Section 307(b).

118. Warren's 1980 consus population was 161,134, making Warren the third largest city in the State of Michigan, and the largest city in Macomb County; the 1980 population of Mt. Clemens was 18,806, making Mt. Clemens the 57th largest city in Michigan, and the sixth largest city in Macomb County. Channel 38 argues that the much larger population of its proposed city of license, Warren, Michigan, entitles it to a decisive preference under the transmission needs aspect of Section 307(b).

119. Warren is a suburb of the larger central city of Detroit. It borders Detroit along Eight Mile Road. It is part of the Detroit metropolitan area and is within the Detroit urbanized area. Although Mt. Clemens is 12 miles from Detroit, it, too, is part of metropolitan Detroit and is within the Detroit urbanized area. Both Warren and Mt. Clemens are in Macomb County, which is contiguous to Detroit. The proposals of both applicants would provide coverage to the entire Detroit metropolitan area, including city grade coverage to Warren and Mt. Clemens. Although they are separate municipalities, both Warren and Mt. Clemens interact with Detroit in many ways. Realistically, each of them is a part of metropolitan Detroit.

120. This case involves a television channel. The Review Board has noted:

> "Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues ... the number of television channels is much more limited and, consequently, the television service area for Section 307(b) purposes 'should be defined in terms of coverage and not in terms of artificial political boundaries.' ... television stations - unlike FM broadcast stations - are generally considered as providing 'an areawide, rather than a localized service'." *Cleveland Television, Corp.*, 91 FCC 2d 1129, at 1137."

The area wide nature of the proposals in this case is evident: each applicant would supply a Grade B signal to over 4 million people, while the populations of the proposed communities of license are nowhere near that total. Although both Warren and Mt. Clemens are distinct municipalities without a local television outlet, Channel 38 does not warrant a Section 307(b) preference for its proposal to locate in Warren. The proximity of Warren and Mt. Clemens to each other and to Detroit, and the fact that both applicants propose to serve substantially the same areas and populations, require that the choice here be based on an objective comparison of which applicant is better qualified to serve the needs of some 4 million persons who would receive essentially the same area wide television service. *Buena Vista Telecasters of Texas, Inc.*, FCC 83R-56 (Review Board, released August 24, 1983).

Comparative Issue

121. Channel 38 seeks a "slight" preference for its auxiliary power proposal. The *Addendum to the Policy Statement*, 2 FCC 2d 667 (1966) provides that auxiliary power is a factor only in AM and FM broadcast proceedings. Therefore, no preference will be awarded for an auxiliary power proposal in this television case.

122. Neither applicant, nor any of its principals, hold any interest in other media of mass communications. Thus, on the issue of diversification, the applicants are equal.

123. Adell's proposal for the integration of ownership into management is both quantitatively and qualitatively superior to that of Channel 38. One hundred percent of the stockholders of Adell will participate in station operations on a full-time basis. Channel 38 shows seventy percent full-time plus five percent part-time integration. Adell's proposal is enhanced by virtue of the fact that all of its integrated stockholders are local residents. It is further enhanced by minority participation (10 percent) and the full-time participation of a woman (5 percent). Additional enhancement is provided by the broadcast experience of Adell's proposed program director Mr. George White, and by the civic activities of Mr. White and Ms. Ruth A. Riley.

124. Before the application of TTC was amended to include the Macomb stockholders, it had no principals who were women, or minorities, or anyone with broadcast experience. The integrated principals of Macomb would have brought enhancing factors to the merged applicant (Channel 38), but the merging parties expressly disclaimed any qualitative enhancement, such as for the involvement of minorities, women, or persons with broadcast experience, resulting from the merger. That disclaimer was accepted by the presiding officer as a condition of the approval of the parties' merger agreement. *Order* FCC 83M-1294, released April 20, 1983. Adell Broadcasting Corporation receives a decisive preference on the integration criterion of the standard comparative issue. It is, therefore, the superior applicant, and its application will be granted.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion, the application of Adell Broadcasting Corporation IS GRANTED and the application of Michigan Channel 38, Inc., IS DENIED.[4]

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[4] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial

FEDERAL COMMUNICATIONS COMMISSION
EDWARD LUTON, *Administrative Law Judge*

Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276(d).

Aeronautical Radio Navigation Service
Aeronautical Service
CATV Interference

Cable systems may operate on frequencies allocated for aeronautical radio if they meet frequency offset, monitoring and cumulative signal leakage requirements.
—*Amendment of Part 76*
Docket No. 21006

FCC 84-516

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 76 of the Commission's Rules to Add Frequency Channelling Requirements and Restrictions and to Require Monitoring for Signal Leakage From Cable Television Systems	Docket No. 21006

SECOND REPORT AND ORDER

Adopted: October 26, 1984; Released: November 9, 1984

BY THE COMMISSION:

Introduction

1. We have before us the *Further Notice of Proposed Rulemaking*, 76 F.C.C. 2d 311 (1980), in this proceeding proposing revision of Commission Rule (§§76.610-76.613) adopted in the first *Report and Order*, 65 F.C.C. 2d 813 (1977), in this docket. These regulations were enacted to ensure that cable television (CATV) systems not cause harmful interference to the operation of aeronautical and marine radio services and yet allow maximum possible use of broadband cable systems.

2. Cable TV systems are not generally considered to be sources of interference to over-the-air radio services because their signals are conveyed within a closed cable. However, interference can occur if signal leakage of sufficient magnitude occurs due to poor construction of, or damage to, a system's coaxial cables. In the beginning of the cable television industry's development, cable systems used only VHF televi-

sion frequencies that could be received directly by conventional television receivers (54-72 MHz, 76-88 MHz and 174-216 MHz). When cable operators foresaw the need for additional channel capacity, they began to operate on frequencies generally referred to as "midband" (108-174 MHz) and "superband" (216 to 400 MHz). These frequencies are used over-the-air by other radio services including aeronautical, marine, and emergency radio services. Excessive radiation leakage from cable systems operating on frequencies in the "midband" and "superband" can cause interference to over-the-air radio communications on frequencies in these safety and emergency services.[1]

Background

3. On July 27, 1977, the Commission adopted the first *Report and Order,* providing an interim solution to cable usage of aeronautical radio frequencies. It prohibited use of any frequency within 100 kilohertz (kHz) of emergency frequency 121.5 MHz or within 50 kHz of emergency frequencies 156.8 MHz and 243.0 MHz and implemented the following: (1) cable frequency offsets of 50 kHz or more from aviation navigation frequencies used in bands 108-118 and 328.6-335.4 MHz within 111 kilometers (60 nautical miles) of any portion of the cable system; (2) cable frequency offsets of 100 kHz or more from aviation frequencies used in bands 118-136 MHz, 225-328.6 MHz and 335.4-400 MHz within 111 kilometers of any portion of the cable system; (3) regular monitoring of any cable system using midband or superband frequencies for signal leakage sources on at least an annual basis; (4) notification and offset requirements applicable to all cable systems operating in these radio frequency bands with peak power levels equal to or greater than 10^{-5} watts;[2] and (5) suspension or termination of operations in frequency bands by any cable system causing harmful interference to emergency over-the-air radio services.

4. Subsequent to release of the *Report and Order,* the Commission commenced a study to determine how the public could be assured that harmful interference to aeronautical and marine emergency radio services would not occur from cable television operations. To assist in this task, it chartered the Advisory Committee on Cable Signal Leakage which provided advice on the conduct of the study, evaluated the results, and authored a report which recommended a new regulatory approach for the

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[1] The frequency bands at issue in this proceeding which are allocated for aeronautical use are 108-136 MHz, and 225-400 MHz, as well as the aeronautical and marine emergency frequencies 121.5 MHz, 156.8 MHz and 243 MHz.

[2] By an *Order,* 85 F.C.C. 2d 397 (1981), the Commission modified the notification procedure by providing that cable systems could not operate in aeronautical radio bands until approval had been provided by the Commission. Formerly, cable systems merely had to provide notification 60 days prior to use of a frequency in these bands.

Commission.[3]

5. On November 1, 1979, the *Final Report of the Advisory Committee on Cable Signal Leakage (Advisory Report)* was released. The Committee concluded that it is possible to predict, by ground-based measurement techniques, whether a cable system will produce fields that could cause interference to aeronautical radio services and, based upon this conclusion, advocated a new regulatory approach for the Commission. This approach consisted of the following elements: (1) "grandfathering" existing systems under a modified version of existing rules, for a period of 5 to 10 years to permit cable system improvements in the normal course of rebuilding; (2) adoption of a new set of rules based on proof that cable system leakage is below a specified threshold and allowing cable systems meeting this criteria, by implementation of either airspace or ground-based measurements, to use any frequencies desired (with a very few minor restrictions); (3) increasing the permissible level of individual cable leakage sources; and (4) retention of Commission authority to terminate a cable system operation if harmful interference occurs, regardless of whether leakage criteria are met.

6. On March 24, 1980, the Commission issued a *Further Notice of Proposed Rule Making (Further Notice)* inviting comments on the Advisory Committee's technical conclusions and recommendations.[4] In large measure, the Commission's proposed changes to the rules paralleled or supplemented recommendations of the Advisory Committee.[5] In response to the *Further Notice,* the Commission received initial or reply comments from over twenty-five different parties including cable television operators, a cable television manufacturer, cable engineering consulting firms, a cable television trade association, private aviation interests represented by aeronautical service or trade associations, a commercial frequency and spectral monitoring firm, amateur radio operators, as well as other federal governmental agencies.[6] Many of these parties also responded to the *Public Notice* of March 12, 1981, inviting additional

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[3] Active participants in this study included the Federal Aviation Administration, the National Cable Television Association, the National Telecommunications and Information Administration of the Department of Commerce, representatives of the cable television industry and private aviation interests as well as the Commission.

[4] The initial and reply comment periods were originally April 25, 1980, and May 12, 1980, respectively, but by *Order,* adopted April 22, 1980, were extended to June 25, 1980, and July 10, 1980, respectively.

[5] Because results of the research project indicated a low potential for interference to maritime radio services, no rules except those relating to emergency frequency 156.8 MHz were proposed in this area.

[6] We are denying the request submitted by Southern California Frequency Coordinating Committee for an extension of time since it fails to conform with the guidelines of Section 1.46 of the Rules.

comments on the general feasibility of frequency offsets.[7]

Summary of Comments

7. There was considerable discussion by commenters on the degree and nature of risks posed by cable interference on frequencies in use by the aeronautical radio service. Incidents of cable signal leakage detection were also discussed. These matters are germane to the question of whether cable operators should be permitted, as generally recommended by the Advisory Committee, to operate without restriction on any frequency in aeronautical radio service bands. Aside from the *Advisory Report,* neither cable nor aviation interests cite or rely on any studies or research not previously considered by the Commission.

8. Aviation interests maintain that there have been at least three documented instances of cable interference,[8] proving that the present rules are not adequate. They further state that all available engineering studies to date fail to provide sufficient evidence to show that without frequency offsets cable systems can operate and not cause interference in the aeronautical bands. While the Federal Aviation Administration (FAA) recommends strengthening existing rules, Aeronautical Radio, Inc., and Air Transportation Association (ARINC/ATA) are convinced that the only meaningful solution to the problem is to prohibit cable use of aeronautical frequencies completely.

9. On the other hand, cable interests contend that the number of incidents of interference in the aeronautical radio band is exceedingly small, especially considering that there are more than 4,100 cable systems covering over 10,000 communities. Indeed, some cable interests maintain that even in the few reported incidents that did occur, no harmful or serious interference to aeronautical radio transmissions occurred. For example, Warner Amex Cable Communications, Inc., states that not a single case of "harmful" interference has been documented and that even in the worst case which has occurred to date, no documentation exists to show that actual communications were disrupted. In addition, cable interests maintain that the cable industry's record over the years is commendable especially when considered with records of other services

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[7] To ensure all interested parties a full and fair opportunity to participate in this proceeding, by public notice (#07947) dated March 12, 1981, we invited additional comments on new information placed in the docket and, additionally, by public notice (#003310) dated September 11, 1981, we advised interested persons to file final comments by September 18, 1981. We accepted all comments and reply comments filed prior to September 18, 1981, as timely filed. Comments submitted after that date shall be treated as informal submissions.

[8] There are currently five documented cases of cable TV interference to aeronautical radio systems, as discussed later in this *Report.* While there was some debate over what constituted interference, the *Further Notice,* at the time of its release, made general reference to "three cases."

and that, on balance, cable operators have been diligent in complying with the rules.[9]

Discussion

Reported Incidents of Interference.

10. In the first *Report and Order*, we noted that cable signal leakage can cause "harmful interference," but believed the probability of actual disruption of aeronautical communications services was remote. We believed there were two principal ways by which cable interference could occur: (1) by gross neglect of signal leakage problems in the cable system, leading to a large number of leakage sources, or (2) by the occurrence of one or more complete breaks in the outer conductor of the cable itself. At that time we knew of only one such case of interference. This documented incidence of interference, which occurred in Harrisburg, Pennsylvania, in April, 1976, resulted from a radiating signal from a cable system owned by Sammons Communications of Pennsylvania. The signal caused unwanted noise in aircraft receivers by the opening of squelch circuits.

11. There have since been four more reported incidents of cable signal leakage into aeronautical radio frequencies. The second additional incident occurred in September, 1978, near Hagerstown, Maryland, during the course of field work conducted by Advisory Committee members. In this case, the interfering signal was traced to a cable system, owned by Antietam Cable TV, which had in operation a signal pilot carrier on the same frequency as the aircraft navigation operation.[10]

12. The third reported incident involved a pilot carrier signal on a cable system, owned by Oxnard Cablevision in Oxnard, California. In October, 1978, the FAA notified the Commission that, for several weeks, aircraft had been intermittently receiving interference to communications between aircraft and the air traffic control center. Because this was a possible hazard to safety of life and property the Commission issued a cease operations order pursuant to Rule 76.613(c). Subsequent monitoring and investigation revealed that the cable operator had failed to file the required notification of prospective use of frequency in accordance with Rule 76.610. Additionally, the cable system had signal leakage at a

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[9] In support of that contention, the National Cable Television Association (NCTA) provides statistical information, garnered from *FCC Reports of Interference Complaints Received* (compiled on a periodic basis by the Field Operations Bureau), to show that cable television ranks low as a cause of interference to aeronautical frequencies, whereas, aviation ranks high as a source of interference to its own radio services. Further reference to all parties' comments will appear in the Discussion Section of this document.

[10] The Commission did not institute any forfeiture or other formal enforcement action against the cable operator because the cable operator had voluntarily consented to be a participant in the research program, and had readily complied with the Advisory Committee's request to change from the frequency in use.

number of locations in excess of limits specified in Section 76.605(a)(12) of the Commission's Rules.[11]

13. The fourth reported case occurred near Wilmington, North Carolina, and was traced to a cable system owned by Coastal Cable Company which operated in North Myrtle Beach, South Carolina. In April, 1979, the FAA notified the Commission that incoming aircraft were experiencing interference on a frequency used by aircraft on landing approach to the Wilmington Airport. Investigation revealed that a cable system in North Myrtle Beach was operating a pilot carrier signal on 118.25 MHz for controlling the gain of the system's amplifiers. Subsequent testing confirmed that the cable system was the source of the interference.[12] The cable operator subsequently changed the pilot frequency to 118.137 MHz in accordance with Section 76.610(b) of the Rules.

14. The fifth and most serious incident of cable signal leakage into aeronautical radio bands involved a cable system in Flint, Michigan, owned by Comcast Cablevision Corporation. During the months of August and September, 1980, aircraft flying in the vicinity of Flint were repeatedly experiencing interference on frequency 133.25 MHz when attempting to communicate with the air traffic control center in Oberlin, Ohio. It was discovered that the sources of the interference were annular cracks in the outer sheathing of a cable line on the cable system.[13] The leakage source was repaired and no further interference was detected.

15. A subsequent inspection of a portion of the entire Flint cable plant, however, uncovered the existence of several more leaks, each of which substantially exceeded the 20 uV/m at 3 meters standard of Section 76.605(a)(12). In addition, it was learned that the cable operator had not complied with prior notification requirements for use of frequency 133.25 MHz and four other frequencies in the aeronautical radio service bands.

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[11] Subsequently, the operator of the system was issued a notice of apparent liability for forfeiture in the amount of $1,500 for violation of Section 76.610(b) of the Rules. In *Memorandum Opinion and Order re Oxnard Cablevision* (Mimeo No. 20594) (released August 24, 1979), the operator was assessed the full amount on the basis that the failure to report its intended use of a frequency within the 108-136 MHz band frustrated critical Commission efforts to avoid precisely the kind of potentially dangerous interference to aeronautical uses which occurred in this case. It was further stated that where such crucial regulatory objectives as the safety of life and property in the air are served, the Commission's Rules must be strictly enforced and compliance strongly encouraged by substantial penalties for violations.

[12] In its reply comments to the *Further Notice*, NCTA states that signal leakage in the Carolina case was minimal and that the interference was not the product of direct cable signal leakage. Instead, it suggests that the interference may have resulted from radiating elements at the cable headend tower.

[13] Inspection of the cable showed two annular cracks which might have made the length of outer sheathing between the two cracks act as a sleeve dipole antenna resonant near frequency 133.25 MHz.

Nor did the cable operator stop using the channel after notification from the Commission of a potential interference conflict from that frequency usage. In reviewing the circumstances of this case, the Commission stated that the cable operator's actions, taken as a whole, demonstrated a shocking disregard for the safety of life, and were so grave in nature that it imposed the maximum forfeiture allowable by statute ($20,000).[14]

16. We believe these five cases clearly show the potential dangers that exist from uncontrolled cable signal leakage and from the failure of cable systems to offset from frequencies in use by aeronautical services. In each of the reported incidents, cable operators failed to observe the frequency offset requirements and essentially operated on the same frequencies used by aeronautical radio services in the area.[15] In each of the cases, cable operators also had signal leakage sources in excess of the permissible limits of Rule 76.605(a)(12). Additionally, in each of the cases cable operators failed to engage in regular and routine monitoring of their systems pursuant to Section 76.610(d) of the Rules. The Flint, Michigan incident, which occurred after the *Further Notice* was released, has caused us to reevaluate our initial position on the risks presented by operation on the same frequencies used by aeronautical radio services. That incident pointed out not only the danger involved in co-channel use of aeronautical frequencies, but the substantial risk presented by a major break in a cable system. Therefore, we are now considerably less confident than we were when we issued the *Further Notice* that cable operators will diligently control signal leakage on their systems or operate safely without frequency offset requirements.[16]

17. Our concerns are not alleviated by the cable industry's record of relatively little interference to aeronautical radio services over the last 20 to 30 years. For only in recent years have cable operators begun to make use of the midband and superband channels. Until recently there have been very few instances of simultaneous use of the same frequency by

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[14] *Comcast Cablevision Corporation,* 86 F.C.C. 2d 707 (1981).

[15] This appears to be true, as well, for the incident which occurred in the vicinity of Wilmington, North Carolina, even though there is strong disagreement between cable and aviation interests over the precise cause and location of the interference. While the FAA suggests that the interference may have resulted from phase addition of leakage sources from the cable system forming in effect an "endfire radiation antenna pattern," it concedes that available information is too inconclusive to show the actual cause. The FAA does submit, however, that the interference resulted directly from the operation of a cochannel carrier in the system and could have been avoided by frequency offsetting.

[16] In this regard, even the previous research of the Advisory Committee casts some doubt and skepticism over a cable operator's ability to operate in aeronautical radio bands without offsets because of risks presented by cable signal leakage. Technical Conclusion (3) of the *Advisory Report,* at 99, states that two of thirteen systems examined exhibited airspace fields "which could be expected to cause interference to aeronautical radio receivers."

cable systems and nearby aeronautical radio services. Only in the last few years has the FAA been making communications frequency assignments at 50 kHz (and more recently at 25 kHz) intervals thus, placing aeronautical radio services on frequencies traditionally used as closed circuit carrier frequencies for cable television signals. We postulate that the low number of reported incidents of interference attributable to cable might well be because cable television, considered to be a closed transmission medium, was never thought by an affected party to be the source generating the interference.

18. The cable industry has alleged that its record of compliance with our interference rules is exemplary. However, the inspection program of the Commission's Field Operations Bureau has discovered numerous systems in violation of the 20 uV/m standard of Rule 76.605(a)(12), noncompliance with notification requirements of Rule 76.610, or violation of frequency offset requirements. This indicates that many cable operators have been lax in their responsibilities in this area and that the cable industry's record of compliance is questionable. We believe the record supports strengthening, not relaxing, the present requirements, especially considering the potential for aviation disaster.

19. Based on the record at this time, we are unable to conclude that cable operators can be relied upon to maintain their systems sufficiently free from signal leakage as not to create risks of harmful interference in the aeronautical radio frequency bands. Many have not adequately complied with either signal leakage standards or monitoring requirements. Although no new cases of interference have been reported during the past four years, as the FAA begins upgrading its facilities and "splitting" channels, conflicts become increasingly likely. Until such time as there is confidence that CATV systems are sufficiently closed transmission facilities so as to be incapable of causing harmful interference to services in these bands, it is necessary to continue with a regulatory solution.

20. While we wish to decrease the potential for interference to aeronautical services from cable television operations, we believe that there are less drastic solutions than frequency prohibitions. The Advisory Committee has recommended that cable systems be allowed to operate in the aeronautical radio bands with certain less-imposing restrictions than the present frequency offsets. Limited frequency offsets, basic cable signal leakage performance tests, and monitoring requirements constitute a reasonable accommodation of the desire to prevent harmful interference to aeronautical radio services with our intention of allowing maximum possible use of broadband cable TV system. The new rules will provide for cable operation in aeronautical radio bands 108-136 MHz and 224-400 MHz. The specifics will be discussed in the following paragraphs.

Frequency Offset Requirements

21. The record supports frequency offsets as being necessary to ensure an absence of harmful interference to aeronautical frequencies. Accordingly, the new frequency offset requirements will be made applicable to all cable carriers even if the aeronautical channel to be protected is not in use locally. This will provide assurance to cable operators and aviation interests alike that cable systems will not interfere with aeronautical transmissions. Furthermore, it will bring a much needed simplification to enforcement efforts. Uniform offsets also will eliminate the need for frequency clearances.[17] In sum, cable operators and aviation interests under the new rules will no longer need to be concerned over prospective conflicts with aeronautical channel usage as long as the new criteria are met.

22. *Communications Bands.* In the aeronautical communications bands, the new rules will permit frequency offset separations of 12.5 kHz from aeronautical frequencies and specify a frequency tolerance of ± 5 kHz. Therefore, cable carriers would always be offset by at least 7.5 kHz from any aeronautical radiocommunication frequency. This change represents a significant reduction from the existing frequency offset requirement of 100 kHz, ±25 kHz. Moreover, the FAA in its comments indicated that heterodyne beats above 4 kHz audio frequency are cutoff in typical communication receivers. That is, beats of 7.5 kHz would not be heard by aviation pilots. Even if a receiver passes audio above 4 kHz it should not cause objectionable interference.

23. Some of the cable interests maintained that frequency offsets would be extremely burdensome. They argued that the existing cable technology providing for 400 MHz and higher systems with channel capacities of 50 or more rely on precise interval carrier frequency plans designed to reduce or eliminate distortion effects which ordinarily accompany increased channel loading. NCTA states some frequency plans presently employed by cable operators consist of: (1) the harmonically related carrier plan (HRC) in which the visual carrier frequencies are precisely assigned to multiples of 6 MHz; and (2) the incrementally related carrier plan (IRC) in which the carrier frequencies equal 1.25 MHz plus some integral multiple of 6 MHz. NCTA asserts that it is not possible under either plan to offset visual carrier frequencies without significantly degrading system performance.

24. There is evidence in this proceeding, however, that shows that cable operators employing HRC systems can meet frequency offset requirements similar in nature to those advocated by the FAA in its

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[17] Upon cable operators' compliance with the current notification requirements of Rule 76.610(b), the Commission coordinates the notified frequencies with the FAA.

comments without too much difficulty and without having to abandon considerable portions of cable bandwidth. For example, the comments of I. Switzer from Cable America, Inc., suggest that cable operators using HRC systems can meet the 12.5 kHz standard. Under this proposal, Switzer indicates that there would be minimal shifts of visual and aural carrier frequencies. Switzer adds that the "heterodyne above audio" principle proposed is one already in use by the FAA, ARINC, and foreign authorities in the operation of networks of aeronautical transmitters on the same nominal frequency.

25. The principal which Switzer advances in this proceeding involves offsetting the 6 MHz master oscillator. Because precise control of the master oscillator affects precise control of all the visual frequencies, the master oscillator can be adjusted to give the desired offset in the aviation bands to the accuracy and stability, if required, of 1×10^{-10} parts through use of a rubidium oscillator.

26. While there is considerable merit in the underlying principle of the Switzer proposal, it may have certain limitations. Although the Switzer proposal may not pose a problem in meeting 12.5 kHz offset in the 118 to 136 MHz portion of the communication bands, it presents problems of insufficient offsets in the 225-400 MHz spectrum. This is because the master oscillator frequency is not set at exactly 6 MHz but at a slightly different frequency interval. This difference in frequency interval at the higher harmonics of the master oscillator causes the offset to move either toward the next higher aeronautical frequency or toward the next lower aeronautical frequency regardless of whether the chosen oscillator frequency is higher or lower than 6 MHz. As a result, in some instances, the frequency separation at the upper end of the cable spectrum may not be able to meet a frequency offset of 12.5 kHz.[18]

27. Further investigation of this approach led to FAA development of a computer program capable of determining whether an HRC system with an offset oscillator would be able to meet required offsets. The program's results showed that a master oscillator set at 6.0003 MHz would provide a minimal offset of 6 kHz up to the HRC's 61st harmonic (Channel 49). The 66th harmonic (Channel 54) would still be separated by 5.2 kHz from the nearest aeronautical frequency of 396.025 MHz. In addition, the program assumed a comb generator oscillator frequency accuracy and stability of ± 1 Hz. In sum, the program demonstrated that a cable system employing

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[18] For example, if we assume a frequency separation of 12.5 kHz from HRC Channel A (120.00 MHz) such that the frequency for Channel A is 120.0125 MHz, the fundamental oscillator frequency will be 120.0125 MHz divided by 20 or 6.000625 MHz. The 40th harmonic of this oscillator frequency will be forty times the frequency 6.000625 or 240.025 MHz. This frequency, however, may coincide with a nominal frequency assigned by the Department of Defense (DOD).

HRC technology would be able to meet a frequency offset of 6 kHz except for the 62nd through 66th harmonic (Channels 50-54). It further showed that even at that 66th harmonic (Channel 54), the minimum frequency separation would nevertheless be at least 5.2 kHz.[19] Thus, under this program, only a minimal number of channels in the aeronautical communication band would be precluded from use by cable systems even if the minimal offset of 5.2 kHz were considered objectionable in this range of the radio spectrum.[20]

28. While IRC-type systems can meet frequency offset requirements of the 12.5 kHz standard, evidence also shows that HRC-type systems can be sufficiently offset without substantial readjustment or displacement of many cable channels on their systems. Therefore, the new rules will also accommodate cable systems employing HRC techniques, as an alternative method of compliance. HRC systems must maintain the master oscillator frequency of the comb generator at 6.0003 MHz with a frequency stability of ± 1 Hz.

29. Some cable interests argued that frequency offsets would pose serious frequency coordination problems for cable operators who desire to transmit digital data over their systems and would inhibit the growth of data services on cable systems. The rules adopted today only restrict cable frequencies in the aeronautical bands if power levels exceed 10^{-4} watts in a 25 kHz bandwidth. Thus, cable operation on these frequencies at peak power levels less than 10^{-4} watts, under rules adopted today, could be used without prior approval from the Commission. Most of the current data services are transmitted at power levels less than 10^{-4} watts. Therefore, since many cable systems may be well suited for the purpose of carrying wideband and data signals, the new rules may actually be less restrictive.

30. The evidence in this proceeding suggests that cable systems of conventional design or ones which use either HRC or IRC techniques can operate using frequency offsets without considerable difficulty or over-

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[19] Commercial aeronautical receivers have an audio passband upper cutoff frequency between 2.75 kHz and 3.00 kHz whereas general aviation receivers have audio passbands in excess of 4.00 kHz. On this point, Malarkey-Taylor states that "the Cable America proposal does, in fact, neatly interweave all of its HRC frequencies between all possible aeronautical assignments; that in all cases, the co-channel beat will exceed 4 kHz and therefore will generally be inaudible."

[20] Even though the last five channels (Channels 50-54) would have an offset of less than 6 kHz (5.2 kHz being the smallest offset) from the next higher aeronautical frequency, we are not aware of any evidence in the record which would indicate that these reduced offsets, combined with new stringent frequency tolerances, would present any problems to assignments for DOD or other governmental use in this portion of the radio spectrum.

whelming cost.[21] The conventional systems can achieve frequency offsets by controlling the frequency stability of each channel independently, as they do today. HRC systems can achieve these offsets by controlling the frequency of all channels from a single source - the harmonic comb generator oscillator - with a very high degree of accuracy and stability.

31. The record indicates that cost for individual crystals to control each frequency in the aeronautical band on a conventional system would be less than $200 each and the cost of a rubidium or similar type crystal needed on an HRC system to set and maintain the master oscillator would be in the $5,000 range. Considering that these are one-time costs that can be amortized or depreciated by cable operators over a relatively short period of time, the benefits of frequency offsetting clearly outweigh the costs. In addition, cable operators will not have to vacate a frequency, or perhaps redesign the technical parameters of their system, if at some time in the future new aeronautical frequencies are put into operation near the system.

32. NCTA claimed that a frequency offset requirement in the aeronautical communication band would constitute an impermissible channelization plan. In the first *Report and Order* and *Further Notice*, we postponed consideration of a general standard frequency channeling plan which would allocate channels throughout the cable spectrum for different services and functions. We did not preclude, however, the use of a more general frequency offset plan which would prevent harmful interference to the aeronautical radio service. The plan adopted herein is flexible and is not "impermissible."

33. *Navigation Bands*. Based upon the *Advisory Report's* recommendation, we are adopting frequency offsets at odd multiples of 25 kHz with a frequency tolerance of ± 5 kHz to provide a minimum absolute offset of at least 20 kHz from any radionavigation frequency assignment.[22] Protection of this nature is necessary because radionavigation receivers might be more sensitive to certain kinds of interference than communications receivers and the consequences of interference could provide false guidance information.

34. Cable interests opposed frequency offsets in these bands for substantially the same reasons they opposed frequency offsets in the communications bands. Aviation interests suggested that the proposed frequency offsets for these bands is the minimum amount of protection

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[21] In this regard, we received very little information on the hardships imposed on existing systems in complying with the present frequency offset requirements. The only filing of a cable operator which attempted to present some tangible evidence of the *possible* burdens that could result to individual systems was made by Warner Amex.

[22] In the *Further Notice*, the Commission specifically proposed a frequency offset criterion for radionavigation bands.

that should be provided. Although ARINC/ATA stated that this proposal would effectively reduce by one half the protection provided by the present rules, it should prevent co-channel interference in that the current navigation band (108-118 MHz) uses 50 kHz channels. ARINC/ATA recommend, however, that the geographical scope of protection should be increased significantly beyond the present 111 km if the adjacent channel protection is reduced to 25 kHz.

35. Since neither FAA nor ARINC/ATA express any significant opposition to a reduction in channel frequency separation from 50 kHz to 25 kHz, this change will be adopted. Because the new rules make the frequency offset requirements applicable to all assignments in both aeronautical radiocommunication and radionavigation without regard for use, there is no need to continue the geographic separation requirements except for those systems allowed to operate under the existing rules on a grandfathered basis. Accordingly, the 25 kHz frequency offset at odd multiples with a frequency tolerance of ± 5 kHz, which will provide a minimum absolute separation of 20 kHz, should provide ample protection.

Basic Signal Leakage Criteria

36. The establishment of basic signal leakage performance standards and procedures is of equal importance with frequency offset standards to assure that cable operations do not cause harmful interference to aeronautical communications. A principal purpose of the Advisory Committee's research was to determine the relationship between cable television system signal leakage and the probability of interference to aeronautical radio services. The Advisory Committee found that an acceptable correlation could be obtained between ground-based measurements and airspace measurements. It concluded that this relationship was sufficiently understood, through a "Cumulative Leakage Index" (CLI),[23] and that it was possible to determine with high reliability whether a given cable system is sufficiently free of signal leakage to prevent airspace radio interference. Accordingly, it recommended that the Commission adopt quantitative criteria for differentiation between acceptable and unacceptable levels of cable signal leakage. It further recommended that the Commission allow those cable systems which met the quantitative criteria to operate within the aeronautical radio service bands. The standard, which the Advisory Committee recommends is as follows:

> The basic leakage performance criterion should be that the 90th percentile power output at the test signal from an aircraft antenna such as that used in the research reviewed herein, at an altitude of 450 meters above the cable system, should be less

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[23] For a complete discussion of the CLI, see the Final Report of the Advisory Committee on Cable Signal Leakage. This report is available as item number PB80-119605 from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161 Telephone 703/487-4650.

than –100 dBm when the cable system is energized with an unmodulated test signal having power equal to the peak power of the highest cable television carrier within the VHF television bands.

37. We indicated that the proposed rules would not specify a 90th percentile of less than –100 dBm at 450 meters altitude especially in view of the Advisory Committee's finding that direct measurement of this standard was not usually feasible. Rather, specified values would be chosen in such a way that the *expected* 90th percentile power at 450 meters would be –100 dBm or less. Since neither the cable operator nor the Commission would generally be able to make a direct measurement of that parameter, rules were proposed which would specify the required measurements. We proposed that the standard could be met by providing evidence, under any one of the following methods (See the *Advisory Report* for a complete discussion of these criteria):

(a) 10 log I_{3000} is equal to or less than –7, prior to carriage of signals in the aeronautical radio bands and at least once a year thereafter;

(b) 10 log I_{∞} is equal to or less than 64, prior to carriage of signals in the aeronautical radio bands and at least once a year thereafter; or

(c) by measurement in the airspace the equivalent field from cable signal leakage does not exceed 10 microvolts per meter at an altitude of 450 meters above the average terrain of the cable system,

Where I_{3000} and I_{∞} are calculated leakage indexes based on ground measurements.[24]

38. Cable television interests generally considered the proposed signal leakage criteria for cable systems acceptable and, accordingly, agreed with the criteria set forth in the *Further Notice*. Moreover, as pointed out by NCTA, improvement in cable technology has further minimized the potential for interference as older systems are replaced by newer, more refined operations with superior system integrity.

39. Aeronautical radio interests did not specifically oppose the basic signal leakage criteria proposal. The FAA did state that if frequency offsets are not adopted by the Commission, then the only acceptable alternative would be to lower the cumulative leakage level from –100 dBm to –125 dBm, which would require redefining the cumulative leakage criteria. The FAA indicated, however, that any redefinition of the criteria would be impractical. Since there was virtually no opposition to the proposed basic signal leakage criteria by either cable interests or

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[24] The Advisory Committee had also recommended raising the individual leakage source limit from 20 uV/m to 100 uV/m. However, this was based on observations of interference in the airspace. Since we wish to maintain interference protection to ground level receivers, we will retain the 20 uV/m leakage limit, as recently affirmed in a Commission action pertaining to CATV interference on amateur radio frequencies. See *Memorandum Opinion and Order* adopted June 15, 1984, denying RM-4040 from the American Radio Relay League, Inc.

aeronautical interests,. and it is in the public interest to do so, we are adopting the criteria as proposed.

40. The standards, procedures, and techniques that are used in determining cable signal leakage performance are extremely important to ensure that cable signal emissions are within acceptable limits and pose little or no danger of harmful interference to aeronautical radio operations. The basic annual signal leakage performance standards should not be confused with regular and routine monitoring and neither should the standards, procedures and techniques for the signal leakage tests be confused with those utilized for monitoring. We note that some parties, in their comments, failed to appreciate the distinction between the proposed basic signal leakage performance standard and regular and routine monitoring requirements. The purposes and objectives of the proposed two separate sets of requirements are indeed different. Simply stated, the basic annual signal leakage performance requirements are intended to provide periodic assessment of a system; whereas regular and routine monitoring requirements are intended to assure that a cable operator undertakes responsible steps and appropriate procedures to detect and correct signal leakage sources throughout the year.

41. *Standard For Cable System Coverage.* For the ground-based methods, the Advisory Committee recommended that the leakage measurements should be based on a sampling of at least 75% of the cable strand and include any portions of the cable system known or expected by the cable operator to have less leakage integrity than the average of the system. The FAA stated that as much of the system as possible should be measured with 75% of the system as a minimum. And, if 75% was not accessible, airborne measurements should be made. In calculating the cumulative leakage index, cable operators should be required, according to the FAA, to include all detectable radiation even if it is less than the maximum level allowable for individual leakage sources. ARINC/ATA also commented that if only 75% of the system is examined, a major fault causing massive emissions may be overlooked.

42. NCTA stated that since alternative procedures for leakage can provide acceptable results, as indicated in the Advisory Committee Report, the method of measuring leakage should remain unspecified. It agrees with the Commission's proposal that the test should be conducted in such a manner as to be representative of the entire cable plant. NCTA believes that in lieu of the 75% requirement, a statistically verifiable test would be more than adequate. Moreover, a non-statistical approach would entail a potentially large measure of discrete measurements which would be extremely burdensome to the cable operator. In addition, NCTA believes that deviations from the standard method should be permitted on an engineering showing that the standard method does not produce

representative results. Further, the collection of data should list the magnitude and location of all leaks detected during routine monitoring over a period not to exceed one year using the measurement method prescribed in Section 76.609(h) of the Commission's Rules.

43. It is not unreasonable to require that 75 percent of the cable plant be examined if ground-based measurements are used. The Advisory Committee in their investigation of the various test procedures measured between 60 and 95 percent of each system. We agree with the Advisory Committee that ground-based measurement of signal leakage, although not a trivial chore, is feasible for most cable television operators who want to use aeronautical radio frequencies. If a cable system is so substantial in size that ground based measurement would be difficult, or impractical from an economic standard, then the airspace measurement method is a practical alternative.

44. We also agree with the Advisory Committee that the sampling should include any portions of the cable system known or expected by the cable operator to have less leakage integrity than the average of the system. In view of the evidence obtained by the Advisory Committee that older systems are most likely to cause interference, the oldest portions of the system should be selected for inclusion in the 75% sampling. If the cable operator performs the basic signal leakage performance measurements over 75% of the cable plant taking into account the older portions of the system, there is no reason to require measurements for the entire system since the calculations used in obtaining the CLI include the worst part of the strand.

45. Airspace measurements must be used if 75% of the system is not accessible for the ground-based measurements. We agree with the Advisory Committee that the use of airborne measurements may be especially important for cable systems serving large numbers of high rise buildings. In those circumstances where a significant portion of the cable plant is installed in high rise buildings, airborne measurements should be undertaken in lieu of ground based measurements, as suggested by ARINC and ATA.

46. Alternative measurement techniques, such as a statistically verifiable approach suggested by NCTA, in lieu of the 75 percent sampling standard, cannot be supported at this time. The Advisory Committee has provided the only authoritative work so far. Moreover, detailed descriptions of any alternative measurement techniques have not been presented. Such information is important for consideration of alternative procedures. The new rules will, however, provide for alternative methods if approved by the Commission.

47. Existing systems will be required to meet the CLI by actual testing. In addition, the results should be included as part of the

notification process before operating under the new rules. Tests must also be performed at least once each year thereafter. Routine monitoring will be required irrespective of whether the system is operating as a new or existing system.

48. In accordance with the FAA's suggestion, new systems will be required to do progressive cumulative leakage tests as construction progresses. Before any portion of a cable distribution plant is turned on with carrier frequencies in the aeronautical bands with a peak power level above 10^{-4} watts in a 25 kHz bandwidth, a cumulative leakage test shall be performed on that portion of the plant. The results should be incorporated into the overall cumulative leakage index which shall be reflective of the cumulative leakage index for the cable distribution plant in actual service.[25] Tests shall be performed at least once a year thereafter. All test results should be maintained by the cable operator for review upon Commission request.

49. *Test Carrier Procedure.* The Advisory Committee also stated in its recommendations relative to both ground-based and airspace measurements that:

> "the unmodulated test carrier should be within the VHF aeronautical radio bands, and at the level of the peak power of the highest signal components within those bands."

50. Cable interests argued that unmodulated test carriers should not be required because such carriers, having no unique identifying information transmitted with them, are difficult to detect. A modulated test signal, however, would permit immediate aural recognition and identification of a test carrier because presumably it would not be duplicated in the external electromagnetic environment. Cable interests also argued that the proposed requirement of an unmodulated carrier would make the presently used measurement devices obsolete. Cable interests contend that the currently used measuring devices are equal or better at detecting signal leakage than those devices using unmodulated carriers. Accordingly, they argue that use of either modulated or unmodulated test carriers should be allowed. Aeronautical interests did not specifically address this point.

51. To allow for cable system concerns, the referenced test procedure shall utilize an unmodulated carrier the power level of which is equal to the peak power level of the highest sync pulse or the highest level of any other signal carrier on the cable system in the aeronautical bands. However, if a modulated test signal is used, the test signal and detector technique must, when considered together, yield the same result as though an unmodulated test signal were used in conjunction with a

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[25] The test carrier which will be used in the tests will be allowed providing the frequency is included in the notification.

detection technique which would yield the equivalent RMS value of said unmodulated carrier.

52. *Calibration: Air Space Measurements.* The Advisory Committee recommended the use of airborne measurements. As suggested by the FAA, the final rule will specify that calibration shall be performed in the city where the leakage measurements are to be taken and within a reasonable period of time prior to the taking of such measurements. The measurement system (including the receiving antenna) should be calibrated against a known field of 10 microvolts per meter produced by a well characterized antenna and ground plane. The half power bandwidth of the detector should be 25kHz or less.

53. *Calibration: Ground-based Measurements.* The Advisory Committee recommended that measurements upon which calculation of I_{3000} or I_{∞} are based must either be made with a dipole and a field intensity meter as described in Section 76.609 (h) of Commission's Rules or by means of another device which is calibrated in a realistic fashion against such dipole and field intensity meter.

54. NCTA believes that the Commission should not mandate a specific procedure, but should allow maximum flexibility subject to good engineering practices, for new measurement techniques. It contends that any set procedure relating to calibration should be performed according to standard engineering procedures. Quantitative measurements to determine field strength of radio frequency energy radiated by cable systems should continue to be made in accordance with Section 76.609 (h) of the Rules, as it has proven to be effective while allowing adequate flexibility. NCTA also suggests that traceable calibration data should be provided for the instrumentation used to perform the measurements. In reply comments, NCTA further considered it inappropriate for the Commission to mandate a choice of leakage detection systems because there is a need for maximum flexibility to enable the adoption of new and better measurement techniques as they arise. Otherwise, it believes use of innovative measurement devices which might provide more accurate measurements may be restricted.

55. Although the FAA does not believe that measurement procedures should be detailed in the Rules, it is of the view that the Commission should publish descriptions of several different acceptable methods by means of Commission reports or public notices. Such publications should state whether the method described is suitable for individual or cumulative measurements or both. The Rules should require, however, that one of the acceptable methods should be used. If new procedures or instrumentation become available, the Commission should evaluate the suitability of the development and issue a public notice if the method is found to be acceptable. In reply comments, the FAA maintained that its

recommendation that descriptions of acceptable measurement techniques be published by the Commission is intended to maintain some level of uniformity in the measurement process. The FAA agrees with NCTA that good engineering practice should be adhered to in making measurements, but adds that in matters of commercial aviation good engineering practice often includes standards much more strict than in non-aviation engineering disciplines. In addition, it agrees that traceable calibration data for the instrumentation used in routine monitoring and maintenance should also be on file with the Commission. The purpose of the requirement, according to the FAA, is for a simple look at the cable system to evaluate its year-by-year performance.

56. The Advisory Committee's recommendations appear well based and are being adopted. The calibration method should be in accordance with good engineering standards if the measurements are not made with a dipole and field intensity meter as described in Section 76.609(h) of the Rules. Also, no comments were received objecting to our proposal to modify Section 76.609(h) to require a separation of 3 meters in all cases. Therefore, the Rules will be so modified.[26] We will also adopt the suggestion by NCTA that traceable calibration data be provided for the instrumentation used to perform the measurement. Any cable system not using the dipole method of measurement described in Section 76.609(h) must be able to support the procedure used.[27]

Cable System Power Levels

57. Based upon the *Advisory Report*, the *Further Notice* proposed to change the cable system power levels, at which the aeronautical restrictions apply, from 10^{-5} watts to 10^{-4} watts. The Advisory Committee in its research had determined that aural signal carriers are low power and have a very low probability of causing interference even under "worst case" conditions of signal leakage. Thus, these low level signals could be excluded from frequency offset requirements. The 10^{-4} watts power level in a 25 kHz bandwidth will provide that exclusion.

58. ARINC/ATA contends that the documented cases of interference to voice communications show that the proposed change in cable system power levels is not warranted. In particular, they allege that the proposed changes would increase a VOR receiver's susceptibility to interference

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[26] This modification will apply not only to systems which fall within the new requirements, but to existing systems which choose to operate under the existing rules on a grandfathered basis.

[27] We note, for example, that as pointed out in its comments, NCTA has issued several technical manuals or publications on cable signal leakage ("Signal Leakage and Interference Control," Manual No. 741) and cable system measurements ("Standards of Good Engineering Practices for Measurements on Cable Television Systems," NCTA 008-0477).

because the identification signal is aural and its lower power is more sensitive to interference. The FAA was not specifically opposed to the proposed changes, but recommended that indiscriminate increases in conducted power levels of carriers in the air communications bands be prohibited. NCTA is in total agreement with the *Advisory Committee's* recommendation. In response to ARINC/ATA's claims, NCTA states that the sensitivity of the aural receiver portion of a VOR is typically equal to that of aural communications receivers (–100 dBm) and, accordingly, NCTA concludes that the proposed change in threshold power levels is not unreasonable in light of the evidence found in the *Advisory Report.*

59. The Advisory Committee found that the worst cable system signal leakage observed exhibited airspace fields about 11 dB higher than detectable by aeronautical receivers and that these fields were not attributable to aural carriers but to visual carriers. The Advisory Committee pointed out that aural carriers are 13 to 17 decibels lower in level than visual carriers. While interference, as noted by ARINC/ATA, has been caused to voice communications, it has not been attributed to the aural carriers of any cable system, but rather to video signal carriers that were operated on the same nominal frequency as used for aeronautical radio. Therefore, the proposed change in cable system threshold power levels from 10^{-5} watts to 10^{-4} watts is being adopted. In addition, we will retain the threshold power level of 10^{-5} watts, but not for advance notification.

Routine Monitoring

60. Although in the *Further Notice* we expressed reservation about specifying how monitoring should be performed on a cable system, it was proposed that "routine" monitoring should include the use of leakage detectors on at least one service vehicle or in one fourth of the total number of vehicles, or whichever is larger. It was also proposed that cable operators should inspect the entire cable system at least once every three months.

61. Although cable interests did not generally oppose routine monitoring requirements, they strongly urged the Commission not to adopt rigid, detailed monitoring procedures such as specifying the number of vehicles required to be equipped with leakage detectors. NCTA mentioned that alternative methods of monitoring exist within the industry and that, accordingly, the Commission should defer to recognized standard engineering practices on the part of cable operators. NCTA did support the collection of data on the magnitude and location of all leaks.

62. Keystone was strongly opposed to the proposed monitoring requirements that cable operators examine the entire cable plant once every three months and have leakage detectors on at least one service vehicle. Keystone estimated that total cost of equipment for monitoring

would run approximately $70,000 for its systems and that work-hours associated with these requirements would significantly increase the overall costs of these requirements. Instead, it claimed that continual monitoring at the headend of a cable system through the use of crystal-controlled carriers having a strict tolerance would be more practical and feasible than the expensive equipment and manpower burdens inherent in the degree of "routine monitoring" depicted by the Commission.

63. For clarification at this juncture, once again we note the distinction between basic cable signal leakage performance tests and monitoring requirements. The cumulative leakage requirements are intended to determine the cumulative signal leakage index of the system as a whole in terms of interference potential to aeronautical radio services. Routine monitoring requirements are intended to assure that the cable operator checks the system regularly for excessive leaks and makes proper repairs. Such monitoring can be done by service personnel while conducting service calls, installations, etc. The only extra effort on the part of cable operators comes when leaks are found and must be repaired. Such leak repair programs should actually be part of the preventive maintenance programs that are in place today.

64. Because many effective monitoring schemes for cable systems depend on such factors as system size and age, it would be inadvisable to prescribe the exact technical practices to be followed by cable operators in the monitoring and maintenance of their systems. In addition, cable operators must retain records of the monitoring and maintenance procedures utilized, including the monitoring method and equipment employed as well as the manner in which the method is consistent with recognized standard engineering practices. Also, operators must maintain logs which show any leakage sources above the individual signal leakage standard detected by the monitoring, the magnitude and probable cause of these leakage sources, and the dates on which they were corrected. Regular monitoring of the entire system will be required every three months. Again, documentation of monitoring results should be maintained by the cable operator for review upon Commission request.

Grandfathering

65. In the *Further Notice* we proposed a transition period at the end of which existing systems would be required to come into compliance with the new rules. Although a specific time period was not mentioned, it was suggested that this transition period be as short as possible, but long enough to allow existing operators to meet the new standards in the normal course of their rebuilding programs. The Advisory Committee recommended a period of five to ten years.

66. Cable interests favored a transition period. NCTA expressed a preference for a ten year period so that individual systems would be able

to expand existing capacity without being forced to make an economic choice between expansion and rebuilding of existing systems. The FAA was in favor of a transition period of between five and ten years in order to provide an orderly implementation of the rules by all cable systems using ATC bands.

67. We find no need for a lengthy transition period. First, the present rules already subject cable operators to frequency offset requirements especially where usage conflicts with aeronautical radio services. Thus, in many instances, cable operators are already accustomed to frequency offsets. Second, and of great significance, cable operators will not have to rebuild existing systems under the newly revised rules.[28] Third, compliance with the new rules should not be costly for most cable operators because any new costs will be tempered by the cable operator's ability to amortize or depreciate them over a relatively short period of time. For all of these reasons, we believe that a five year transition or grandfathering period will adequately afford existing cable operators the time they need to adjust to the changes under the new rules. While we recognize genuine cable operator concern over difficulty that *might* be occasioned in complying with the rules, we must meet our responsibility to quickly *ensure* the safe operation of radio services vital to the protection of life.[29] Only in documented cases of extreme economic hardship will consideration be given to extending the transition period.

68. In a similar vein, we have decided to reduce the overall scope of grandfathering under the old rules by limiting such privileges to those requests for cable usage of aeronautical radio frequencies received or authorized prior to the adoption of this *Report and Order*. Should usage of any of the authorized frequencies by an aeronautical radio service arise in the vicinity (generally within 111 km) of the cable system, the system will forfeit its grandfathering privileges to that frequency and, absent a grant of waiver, will not be permitted to substitute a different frequency not previously approved by the Commission.[30]

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[28] If compliance with the cumulative signal leakage standard had been required as a condition prior to operation in the aeronautical bands (with or without frequency offset obligations), it is quite possible that a number of cable systems might not have been able to meet this prerequisite without rebuilding entire systems.

[29] The waiver process is suitable for the handling of those few individual cases where it is demonstrated that substantial hardship might result.

[30] We do not believe as suggested by Warner Amex, that cable systems which have precleared frequencies should be permanently grandfathered. Authorizations to cable operators to operate on frequencies in the aeronautical radio bands do *not* create any permanent rights of use. See Section 76.610 of our Rules and Section 304 of the Communications Act.

Compliance And Enforcement

69. As we indicated in the *Further Notice*, the authority to terminate operation of sources of actual interference is fundamental to the Commission's responsibilities. While aviation interests agreed with this statement, they were sharply critical of the Commission's efforts in preventing interference at the outset. The FAA stated that not only had the Commission failed to establish an effective monitoring program directed at preventing signal leakage problems, but it appeared reluctant to enforce its own rules and use its forfeiture powers except in the most egregious instances. Accordingly, aviation interests believed that the Commission should increase its enforcement activities, such as employing its personnel to conduct spot checks and regular monitoring of signal leakage levels. On the other hand, cable interests maintained that a majority of cable operators have complied with the rules and therefore needless regulatory overbearance along the lines suggested by aviation interests was not needed.

70. Compliance and enforcement programs are extremely important to reduce and prevent interference from cable operations and, accordingly, the Commission has considerably stepped up its activities in these areas. Indeed, substantial monetary penalties have been meted out to cable operators who failed to comply with pre-notification and frequency offset requirements. During the past three years, the Commission has issued 22 forfeitures to CATV systems totalling $161,000. In addition, numerous systems have been directed to cease operation for the failure to obtain prior clearance of use of specific frequencies, notwithstanding the substantial economic costs incurred. The number of on-site inspections and investigations of cable systems by the Commission's field staff has been increased in order to determine the degree of compliance with the rules and to ascertain the existence of signal leakage problems. These actions should clearly dispel any notions that might previously have existed concerning this agency's enforcement posture. We continue to believe that the authority to terminate operations that cause harmful interference, as described in Section 76.613, is essential; such authority will be retained. The Commission plans to continue to increase its compliance and enforcement efforts to ensure that cable operators do not pose hazards to the safe functioning of aeronautical radio services.

Conclusion

71. In summary, cable systems may operate in aeronautical radio bands subject to the following provisions:

1. *Frequency Offset Requirements* — In the aeronautical communications bands (118 - 136 MHz, 225 - 328.6 MHz, and 335.4 - 400 MHz), cable carriers must be offset from aeronautical channel center frequencies by 12.5 kHz ± 5 kHz. Aeronautical communication frequencies are spaced at 25 kHz increments,

beginning at the lower band edges. In the navigational bands (108 - 118 MHz and 328.6 and 335.4 MHz) cable carriers must be offset from aeronautical channel center frequencies by 25 kHz ± 5 kHz. Aeronautical navigation frequencies are spaced at 50 kHz increments, beginning at the lower band edges. (Harmonically Related Carrier (HRC) systems will be permitted provided the master oscillator frequency is set at 6.0003 MHz with a stability of ± 1 Hz, regardless of actual offset.)

2. *Basic Signal Leakage Criteria* — Cable systems must show compliance with such criteria by use of groundbased or airspace measurements as a prerequisite for operation in the aeronautical radio bands.

3. *Increased Threshold Power Levels* — The power levels of carriers or signal components in aeronautical radio bands on cable systems is changed (except for operation on the emergency frequencies) from 10^{-5} to 10^{-4} watts.

4. *Monitoring Requirements* — Cable operators using frequency bands 108-136 MHz or 225-400 MHz will have to provide for regular monitoring for signal leakage covering all portions of the cable system at least once every three months.

5. *Grandfathering* — Cable systems in operation before adoption of this *Order* will be allowed to operate under the existing rules for five years, after which time all cable systems will be subject to the new rules.

72. As indicated at the outset, the primary goal in this proceeding is to determine the best way to assure the protection of aeronautical navigation and safety radio services from harmful interference. However, there must be an equal attempt not to constrain the development and utilization of new cable technologies. While the record does not support prohibiting cable operation on frequencies used by aeronautical radio services, it does support technically well maintained cable system operation on aeronautical radio frequencies. If systems comply with frequency offset, monitoring, and cumulative signal leakage requirements, no harmful interference should result. These newly revised rules constitute an appropriate accommodation of the various interests involved.

Regulatory Flexibility Analysis

I. Need for and Purpose of Rule

73. The Commission has concluded that to assure the protection of aeronautical, navigation and safety radio services from harmful interference, cable systems should not be permitted to operate on the same frequencies used by aeronautical radio services. It has also concluded, however, that it is in the public interest for cable systems to operate in the aeronautical radio bands if they comply with frequency offset, monitoring, and cumulative signal leakage requirements.

II. Summary of Issues Raised by Public Comment in Response to the Initial Regulatory Flexibility Analysis, Commission Assessment, and Changes Made as a Result.

A. Issues Raised:

74. Aviation interests argue that the present rules on cable interference to aeronautical radio transmissions are ineffective. They submit that engineering studies fail to provide sufficient evidence to show that cable systems can operate without interference being caused in the aeronautical bands if they are not using frequency offsets and/or leakage index measurements. Cable interests contend that the number of interference incidents in the aeronautical radio band is small. They argue that there have been few reported incidents and furthermore, these caused neither harmful nor serious interference to aeronautical radio transmissions. They contend that they should be able to operate on the same frequencies used by the aeronautical safety services without additional regulatory measures. However, cable interests do not take issue with the proposed signal leakage criteria, or generally oppose routine monitoring requirements.

B. Assessment:

75. At the present time, cable operators cannot be universally relied upon to maintain systems sufficiently free from signal leakage so as not to create risks of harmful interference in the aeronautical radio frequency bands if the same frequencies are used. Frequency offset, signal leakage criteria and monitoring requirements thus are necessary for cable operation in the aeronautical service. Under these new rules, many cable operations with more than twelve channels, that is 65% of present systems, will require a system conversion with its attendant costs. New systems, of course, will not require any such conversion, and their costs will only be minimally increased by the need to comply with these new regulations. These costs are considered a small investment compared to an airliner crash.

C. Changes Made as a Result of This Proceeding:

76. Cable television systems may operate in the aeronautical radio bands 108 - 136 MHz and 225 - 400 MHz if they meet uniform channel frequency offset requirements, basic signal leakage performance criteria (cumulative leakage index), and monitoring requirements.

77. The cable system power levels, at which aeronautical restrictions apply, were relaxed.

III. Significant Alternatives Considered and Rejected.

78. We considered allowing cable usage of non-emergency aeronautical radio frequencies without frequency offsets and/or cumulative signal leakage index requirements. In view of five reported interference incidents, particularly one occuring at Flint, Michigan, we re-evaluated the risks presented by cable operation on the same frequencies used by aeronautical radio services. That incident pointed out not only the danger involved in co-channel use of aeronautical frequencies, but the substantial risk presented by a major break in the cable system. To ensure that cable systems do not cause harmful interference to aeronautical radio services, we rejected proposals allowing cable usage of non-emergency aeronautical radio frequencies without offsets or cumulative signal leakage index requirements.

79. Authority for the action taken herein is contained in Sections 1, 302, 303, 304, 307, 308, and 309 of the Communications Act of 1934, as amended (47 U.S.C. §§151 et. seq.).

80. Accordingly, IT IS ORDERED, That the Commission's Rules ARE AMENDED, effective December 17, 1984, or after approval by the Office of Management and Budget, whichever is later, as described above and set forth in the attached Appendix A.

81. IT IS FURTHER ORDERED That the Secretary of the Commission will publish the *Second Report and Order* in the FCC Reports.

82. The Secretary shall cause a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. *et seq.*).

83. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

84. For further information concerning this proceeding, contact Freda Lippert Thyden, Mass Media Bureau, (202) 632-7792, on legal concerns or Bernard Gorden, Mass Media Bureau, (202) 632-9660, on technical concerns.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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*Appendix B-may be seen in FCC Dockets Branch, 1919 M Street, N.W., Wash., D.C.

Appendix A

1. 47 CFR 76.609 is amended by revising paragraph (h)(3) to read as follows:

§76.609 Measurements.

* * * * *

(h) * * *

* * * * *

(3) The resonant half wave dipole antenna shall be placed 3 meters from and positioned directly below the system components and at 3 meters above ground. Where such placement results in a separation of less than 3 meters between the center of the dipole antenna and the system components, or less than 3 meters between the dipole and ground level, the dipole shall be repositioned to provide a separation of 3 meters from the system components at a height of 3 meters or more above ground.

* * * * *

2. 47 CFR 76.610 is amended to read as follows:

§76.610 Operation in the frequency bands 108-36 and 225-400 MHz—scope of application.

The provisions of Sections 76.611, 76.612, 76.613, 76.614, 76.615 and 76.618 are applicable to all cable television systems transmitting carriers or other signal components carried at a peak power level equal to or greater than 10^{-5} watts at any point in the cable distribution system in the frequency bands 108-136 and 225-400 MHz for any purpose.

3. 47 CFR 76.611 is amended in its entirety to read as follows:

§76.611 Cable television basic signal leakage performance criteria.

(a) No cable television system shall commence or provide service in the frequency bands 108-136 and 225-400 MHz unless such system is in compliance with one of the following cable television basic signal leakage performance criteria:

(1) prior to carriage of signals in the aeronautical radio bands and at least once each calendar year, with no more than 12 months between successive tests thereafter, based on a sampling of at least 75% of the cable strand, and including any portions of the cable system which are known to have or can reasonably be expected to have less leakage integrity than the average of the system, the cable operator demonstrates compliance with a cumulative signal leakage index by showing either that (A) 10 log I_{3000} is equal to or less than –7 or (B) 10 log I_{∞} is equal to or less than 64, using one of the following formulae:

$$I_{3000} = \frac{1}{0} \sum_{i=1}^{n} \frac{E_i^2}{R_i^2},$$

$$I_{CC} = \frac{1}{0} \sum_{i=1}^{n},$$

where:

$$R_i^2 = r_i^2 + (3000)^2$$

r_i is the distance (in meters) between the leakage source and the center of the cable television system;

ff is the fraction of the system cable length actually examined for leakage sources and is equal to the strand miles of plant tested divided by the total strand miles in the plant;

R_i is the slant height distance (in meters) from leakage source i to a point 3000 meters above the center of the cable television system;

E_i is the electric field strength in microvolts per meter (uV/m) measured pursuant to §76.609(h) 3 meters from the leak i; and

n is the number of leaks found of field strength equal to or greater than 50 uV/m pursuant to Section 76.609(h).

The sum is carried over all leaks i detected in the cable examined; or

(2) prior to carriage of signals in the aeronautical radio bands and at least once each calendar year, with no more than 12 months between successive tests thereafter, the cable operator demonstrates by measurement in the airspace that at no point does the field strength generated by the cable system exceed 10 microvolts per meter (uV/m) RMS at an altitude of 450 meters above the average terrain of the cable system. The measurement system (including the receiving antenna) shall be calibrated against a known field of 10 uV/m RMS produced by a well characterized antenna consisting of orthogonal resonant dipoles, both parallel to and one quarter wavelength above ground plane of a diameter of two meters or more at ground level. The dipoles shall have centers collocated and be excited 90 degrees apart. The half-power bandwidth of the detector shall be 25 kHz. If an aeronautical receiver is used for this purpose it shall meet the standards of the Radio Technical Commission for Aeronautics (RCTA) for aeronautical communications receivers. The aircraft antenna shall be horizontally polarized. Calibration shall be made in the community unit or, if more than one, in any of the community units of the physical system within a reasonable time period to performing the measurements. If data is recorded digitally the 90th percentile level of points recorded over the cable system shall not exceed 10 uV/m RMS; if analog recording is used the peak values of the curves, when smoothed according to good engineering practices, shall not exceed 10 uV/m RMS.

(b) In paragraph (a)(1) and (a)(2) of this section the unmodulated test signal used on the cable plant shall: (1) be within the VHF aeronautical band 108-136 MHz and (2) have a peak power level equal to the peak power level of the strongest cable television carrier or signal component carried on the system.

(c) In paragraph (a)(1) and (2) of this section, if a modulated test signal is used, the test signal and detector technique must, when considered together, yield the same result as though an unmodulated test signal were used in conjunction with a detection technique which would yield the RMS value of said unmodulated carrier.

(d) If a sampling of at least 75% of the cable strand (and including any portions of the cable system which are known to have or can reasonably be expected to have less leakage integrity than the average of the system) as described in paragraph (a)(1) cannot be obtained by the cable operator or is otherwise not reasonably feasible, the cable operator shall perform the airspace measurements described in paragraph (a)(2).

(e) Prior to providing service to any subscriber on a new section of cable plant, the operator shall show compliance with either: (1) the basic signal leakage criteria in accordance with paragraph (a)(1) or (a)(2) of this section for the entire plant in operation or (2) a showing shall be made indicating that no individual leak in the new section of the plant exceeds 20 uV/m at 3 meters in accordance with Section 76.609 of the Rules.

(f) Notwithstanding paragraph (a) of this section, a cable operator shall be permitted to operate on any frequency which is offset pursuant to Section 76.612 in the frequency band

108-136 MHz for the purpose of demonstrating compliance with the cable television basic signal leakage performance criteria.

4. New 47 CFR 76.612 Cable television frequency separation standards, is added to Subpart K, Part 76 to read as follows:

§76.612 Cable television frequency separation standards.

All cable television systems which operate in the frequency bands 108-136 and 225-400 MHz shall comply with the following cable television frequency separation standards:

(a) in the aeronautical radiocommunication bands 118-136, 225-328.6 and 335.4-400 MHz, the frequency of all carrier signals or signal components carried at a peak power level equal to or greater than 10^{-4} watts in a 25 kHz bandwidth must operate at frequencies offset from certain frequencies which may be used by aeronautical radio services operated by Commission licensees or by the United States Government or its Agencies. The aeronautical frequencies from which offsets must be maintained are those frequencies which are: (1) within one of the aeronautical bands defined in this subparagraph, and (2) when expressed in MHz and divided by 0.025 yield an integer. The offset must meet one of the following two criteria:

(1) all such cable carriers or signal components shall be offset by 12.5 kHz with a frequency tolerance of ± 5 kHz; or

(2) the fundamental frequency from which the visual carrier frequencies are derived by multiplication by an integer number shall be 6.0003 MHz with a frequency tolerance of ± 1 Hz (Harmonically Related Carrier comb generators only).

(b) in the aeronautical radionavigation bands 108-118 and 328.6-335.4 MHz, the nominal frequency of any cable system carrier or signal component carried at a peak power level equal to or greater than 10^{-4} watts in a 25 kHz bandwidth shall be an odd multiple of 25 kHz with a frequency tolerance of ± 5 kHz.

5. New 47 CFR 76.614 Cable television system monitoring, is added to Subpart K, Part 76, to read as follows:

§76.614 Cable television system monitoring.

All cable television operators shall provide for regular signal leakage monitoring of their cable television systems for signal leakage, covering all portions of the systems at least once every three months. Monitoring equipment and procedures utilized by a cable operator shall be adequate to detect a leakage source which produces a field strength in these bands of 20 uV/m or greater at a distance of 3 meters. During regular monitoring, any leakage source which produces a field strength of 20 uV/m or greater at a distance of 3 meters in the aeronautical radio frequency bands shall be noted and such leakage sources shall be eliminated within a reasonable period of time. The operator shall maintain a log showing the date and location of each leakage source identified, the date on which the leakage was eliminated, and the probable cause of the leakage. The log shall be kept on file for a period of two (2) years and shall be made available to authorized representatives of the Commission upon request.

6. New 47 CFR 76.615 Notification requirements, is added to Subpart K, Part 76, to read as follows:

§76.615 Notification requirements.

All cable television operators shall comply with each of the following notification requirements:

(a) The operator of the cable system shall notify the Commission annually of all signals carried in the aeronautical radio frequency bands, noting the type of information carried by the signal (television picture, aural, pilot carrier, or system control, etc.). The timely filing of FCC Form 325, Schedule 2, will meet this requirement.

(b) The operator of a cable system shall notify the Commission before transmitting any carrier or other signal component with a peak power level equal to or greater than 10^{-5} watts at any point in the cable distribution system on any new frequency or frequencies in the aeronautical radio frequency bands. However, the operator of a cable system which is operating or will operate under Section 76.618 shall not commence use of any frequency or frequencies in these bands using peak power levels equal to or greater than 10^{-4} watts without prior Commission notification. Such notification shall include:

(1) legal name and local address of the cable television operator;

(2) the names and FCC identifiers (e.g. CA0001) of the system communities affected;

(3) the names and telephone numbers of local system officials who are responsible for compliance with Sections 76.610 through 76.618 of the Rules;

(4) statement of compliance with the basic signal leakage criteria by use of groundbased or airspace measurements per Section 76.611;

(5) the geographic location of the cable system which describes in latitude and longitude, in degrees, minutes and seconds a point near the center of the cable system, together with the distance (in kilometers) from the designated point to the most remote point of the cable plant, existing or planned, which defines a circle enclosing the entire cable plant;

(6) a description of the routine monitoring procedure to be used; and

(7) for cable operators subject to Section 76.611, the cumulative signal leakage index derived under Section 76.611(a)(1) or the results of airspace measurements derived under Section 76.611(a)(2), including a description of the method by which compliance with basic signal leakage criteria is achieved and the method of calibrating the measurement equipment. The information described in (b)(7) shall be provided to the Commission each calendar year thereafter.

7. New 47 CFR 76.618 Grandfathering, is added to Subpart K, Part 76, to read as follows:

§76.618 Grandfathering.

A cable television system which commenced operation prior to January 1, 1985, shall be permitted to operate under this section and shall not be subject to the provisions of Sections 76.611 and 76.612 until January 1, 1990, *provided, however,* that all carrier signals or signal components carried at a peak power level equal to or greater than 10^{-4} watts shall be operated at frequencies offset from aeronautical radio services operated by Commission licensees or by the United States Government or its Agencies within 111 km (60 nautical miles) of any portion of the cable system by 45 kHz plus the frequency tolerance of the cable signal or signal component. The limit of 111 km may be increased by the Commission in cases of "extended service volumes" as defined by the Federal Aviation Administration or other Federal Government Agency for low altitude radio navigation or communication services. Operators of cable systems that are notified by the Commission that a change in operation of an aeronautical radio service will place the cable systems in conflict with any of the offset criteria, the operators are responsible for eliminating such conflict at their own expense and shall vacate the frequencies upon direction of the Commission.

Application, Acceptance of
Application, Incomplete
Television, Low Power

Application for review of Bureau's action denying petition for reconsideration and acceptance of application *nunc pro tunc*; and returning low power TV application as unacceptable denied. Low power TV application which does not contain vertical antenna sketch as required by FCC Form 346 is incomplete and unacceptable for filing.
—*American Christian TV System, Inc.*

FCC 84-429

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In re Application of American Christian Television System, Inc. For a Construction Permit for a New Low Power Television Station on Channel 50 Vero Beach, Florida	File No. BPTTL-830218SE

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 1984; Released: September 19, 1984

BY THE COMMISSION: COMMISSIONERS RIVERA AND PATRICK ABSENT.

1. The Commission has under consideration an Application for Review of Action Taken Under Delegated Authority, filed December 15, 1983, by American Christian Television System, Inc. ("ACTS"), of an action by the Chief, Video Services Division, Mass Media Bureau, denying ACT's Petition for Reconsideration and Acceptance of Application *Nunc Pro Tunc* and returning the above-captioned application. The action was taken by letter dated November 1, 1983, and a notice of the action appeared in Public Notice of November 15, 1983 (Report No. 18945).

2. ACTS filed its application for low power television station on Channel 50, to serve Vero Beach, Florida, on February 18, 1983, the last day for filing mutually exclusive applications against the application of

Owen Broadcasting Enterprises, for Channel 50 at Vero Beach, BPTTL-820907SU (Report No. 83-1). ACT's application was returned as incomplete and unacceptable for filing by letter dated May 4, 1983. The letter from the Chief, Low Power Television Branch stated:

> In reviewing Section V, Question No. 6 of the original application, we find that you did not submit the vertical antenna sketch, which should include the height of center of radiation above ground, overall height of structure above ground and height above mean sea level in feet for all significant features. Each application pursuant to Section 73.3514 of the Commission's Rules shall include all information called for by the particular form on which the application is required to be filed, unless the information called for is inapplicable, in which case this fact shall be indicated.

3. ACTS resubmitted its application on June 3, 1983, along with a Petition for Reconsideration and an amendment supplying the missing vertical antenna sketch. By letter dated November 1, 1983, the Chief, Video Services Division denied ACTS's petition and returned its application again. The letter stated that the standard for determining the acceptability of applications for low power television and television translators is "complete and sufficient" and not the "substantially complete" standard of *James River Broadcasting Corp. v. FCC*, 399 F.2d 581 (D.C. Cir. 1968), which is used for other broadcast services. Because the application of ACTS lacked the required vertical antenna sketch, it was deemed incomplete and unacceptable for filing. Moreover, because the application was no longer on file when the amendment attempting to supply the missing information was submitted, the amendment was not effective.

4. In its application for review ACTS argues that the standard for the acceptance of applications for low power television and television translator stations set forth in the *LPTV Report and Order* (*"LPTV Report and Order"*), 51 RR2d 476 (1982), and embodied in Section 73.3564[1] of the Commission's Rules, is not a "perfect" standard but simply a complete and correct standard. ACTS argues that only applications with *blatant* defects are to be returned. Further, ACTS contends that the omission of the antenna sketch was not a blatant defect which rendered the application impossible to process. Contrary to the arguments of ACTS, the Commission did adopt a standard which requires applications to be letter-perfect when filed, as was suggested as appropriate in *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398 (D.C. Cir. 1968). See *LPTV Report and Order, supra* at 501-502. The Commission clearly gave notice that it was departing from the *James River Broadcasting* standard and would require strict compliance with the new acceptability standards, stating, "Defective low power applications will be returned summarily, and if they

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[1] Although ACTS refers to Section 73.3568, the standards for acceptance of applications are found in Section 73.3564 of the Commission's Rules.

are resubmitted with perfecting amendments, they will be placed at the end of the processing line, unless passage of a cut-off date precludes consideration altogether, in which case the resubmission will be returned." *LPTV Report and Order, supra* at 502. ACTS's application was defective under the Commission's Rules since the missing vertical antenna sketch provides specific information which is necessary for processing applications. The information enables the staff to determine possible air navigation hazards and corroborate pertinent antenna information.

5. Perfecting amendments to properly returned applications are not allowed since this practice would substantially delay the processing of all pending LPTV and television translator applications. The Commission simply cannot afford to give applicants repeated opportunities to file a complete and sufficient application. "The Commission's limited resources and the large number of low power applications simply will not permit the staff to coach applicants in correcting defects or omissions in applications that have been filed, as sometimes has been the case in the past." *LPTV Report and Order, supra* at 502. Because of the contour overlap protection criteria used in processing low power television and television translator applications, one application can directly or indirectly affect hundreds of other applications in a daisy chain effect. Thus, the staff must be able to make an initial determination whether an application is complete in order to expedite processing. If defective applications were allowed to be reinstated due to corrective amendments, the potential delay and disarray to hundreds of other applications would be devastating. Additionally, each change in information contained in an application or addition of a returned application requires modifications to the engineering and/or directional antenna data bases and additional computer studies and staff analyses to determine mutual exclusivity with other pending applications. Later amendments to correct defects require the staff to process each application two or more times. Repeated processing will more than double the processing time for all pending applications, not just the application amended. With approximately 30,000 pending low power television and television translator applications, repeated processing of applications and additional delays in processing are just not acceptable and do not promote the public interest in receiving prompt service.

6. ACTS further contends that whatever the standard is for acceptance of low power television and television translator applications, the rule which governs the consolidation of an application with other mutually exclusive applications and gives an applicant a right to a hearing under *Ashbacker v. FCC,* 326 U.S. 327 (1945), is Section 1.227(b) of the Commission's Rules. Section 1.227(b) only applies to the consolidation of applications that are properly before the Commission. ACTS's application

was not such an application. As noted above, it was properly returned as unacceptable for filing, and when resubmitted it was untimely filed after the cut-off date. Therefore, Section 1.227(b) does not require the consolidation of ACTS's application.[2] Additionally, we note that while ACTS cites to Section 1.227(b), that rule was amended, after ACTS resubmitted its application, to exclude low power television and television translator applications. *Selection From Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 93 FCC 2d 952 (1983). Comparative procedures for low power television and television translator applications are now governed by Section 1.601 *et seq.* of the Commission's Rules. Thus, clearly Section 1.227(b) no longer applies to low power television applications.

7. ACTS contends that it has a vital right to a hearing which is protected by the Communications Act of 1934, as amended, and *Ashbacker v. FCC, supra*. However, this assertion is undermined by the fact that the Communications Act was amended in 1982, Pub. L. No. 97-259, 96 Stat. 1087 (1982), to provide for the selection from among competing applicants by the use of a random selection process, when the Commission deemed such process appropriate. The Commission adopted a lottery procedure for low power television and television translator applicants and, thus, even if ACTS's application was accepted *nunc pro tunc*, it would not be entitled to a hearing as it contends. As part of this revision, Section 309(i)(1) of the Communications Act was amended to state that "the Commission after determining that each such application is acceptable for filing shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection." Not only does the Communications Act no longer guarantee a hearing to mutually exclusive applications, but it also restricts the inclusion in lotteries to applications that are acceptable for filing. Conf. Rep. No. 765, 97th Cong., 2d Sess. 39 (1982). In any event, *Ashbacker* does not require that ACTS be accorded any kind of comparative consideration in this instance where its application does not meet the Commission's completeness standard. The Supreme Court expressly indicated in *Ashbacker* that the Commission could establish procedural rules to govern the processing of applications. *Ashbacker v. FCC*, 326 U.S. at 333 n. 9. The courts have consistently upheld our authority to place such procedural limitations upon applicants. *See Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963); *Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961). Similarly, the Court has held that the Commission may properly place substantive restrictions upon applicants. *See United States v. Storer Broadcasting Co.*, 351 U.S.

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[2] The reference to the "substantially complete" standard in Section 1.227(b) also does not support ACTS's position. That standard only applies to applications that are properly before the Commission, which ACTS's application is not.

192 (1956). Applications such as ACTS's, which fail to meet the Commission's completeness standard and, therefore, are defective, are not entitled to comparative consideration. Accordingly, ACTS's *Ashbacker* argument is meritless.

8. Based on the foregoing, we believe that the Bureau fully considered and properly decided the matter. Consequently, ACTS's application for review will be denied.

9. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the application for review filed by American Christian Television System, Inc. IS DENIED.

10. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this Memorandum Opinion and Order by Certified Mail-Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Application, Acceptance of

Application for review of Bureau's action returning both amendment and application for CP granted to an extent and denied otherwise. A major amendment to pending low power television application to change site due to loss of antenna site, which was filed during the 90-day amendment period set forth in June 23, 1982 *Public Notice* was unacceptable since it did not meet the amendment criteria. —*American Christian TV System, Inc.*

FCC 84-430

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In re Application of American Christian Television System, Inc. For a Construction Permit for a New Low Power Television Station on Channel 30 Tulsa, Oklahoma	File No. BPTTL-810116HT

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 1984; Released: September 19, 1984

BY THE COMMISSION: COMMISSIONERS RIVERA AND PATRICK ABSENT.

1. The Commission has under consideration an Application for Review of Action Taken Under Delegated Authority filed February 27, 1984, by American Christian Television System, Inc. ("ACTS"). ACTS seeks review of the action of the Mass Media Bureau denying a Petition for Reconsideration and Acceptance of Application *Nunc Pro Tunc* and returning the above-captioned application as unacceptable for filing. The action was taken by letter from the Chief, Low Power Television Branch dated February 6, 1984.

2. ACTS filed its application for a new low power television station to serve Tulsa, Oklahoma, on channel 30, on January 16, 1981. ACTS submitted an amendment to its application on September 21, 1982, to specify operation on channel 68 and to specify a new transmitter site: ACTS states that this amendment was filed in response to the *Public*

Notice, 51 RR 2d 1275 (released June 23, 1982) which provided a 90-day application amendment period for low power television and television translator applications after the adoption of the low power television rules. Because ACTS's amendment proposed an impermissible site change, it was not taken into consideration. ACTS's original application was subsequently returned as unacceptable for filing by letter dated December 7, 1983, because it was determined that it would cause objectionable interference to television station KCVT, channel 30, Shawnee, Oklahoma.

3. In its Petition for Reconsideration ACTS pointed out that on September 21, 1982, it tendered an amendment to its application to specify operation on channel 68 in order to avoid interference to KCVT on channel 30. As outlined by the staff in the letter of February 6, 1984, denying the Petition for Reconsideration, the portion of ACTS's amendment which specified operation on channel 68 would have been acceptable for filing as a major change during the 90-day amendment period. However, the portion of ACTS's amendment which specified a new transmitter site due to loss of its previous site was not acceptable for filing the 90-day amendment period.

4. The *Public Notice* provided for the filing of two groups of amendments during the 90-day amendment period which ended on September 21, 1982. The first group of amendments was for "technical and nontechnical information required to render the application complete and accurate." *Public Notice, supra*. As detailed in the *Low Power Television Report and Order*, (*LPTV Report and Order*) 51 RR 2d 476 (1982), this included such information as "appropriate antennas, with model numbers, a correct polar diagram, including the total polar plot, accurate overall height above ground of the antenna and altitude of ground above mean sea level figures and accurate coordinates for the site proposed. . . ." *LPTV Report and Order*, 51 RR 2d at 504 n. 49.

5. The second group was for "amendments filed to bring the application into compliance with the technical and engineering standards of the rules." *Public Notice, supra*. All such amendments were subject to an adequate showing by the applicant that the application involved engineering conflict with an existing broadcast station that precluded grant of the proposal without the tendered amendment. Thus, ACTS's frequency change to avoid interference to an existing broadcast station was acceptable as a major change. The portion of ACTS's amendment to specify operation on channel 68 will be accepted and the application will be reinstated and given new file number BPTTL-820921L6, to reflect the filing date of the amendment.

6. Applicants filing site change amendments during the 90-day amendment period were required to make an adequate showing that the

application involved an engineering conflict with an existing broadcast station that precluded grant of the proposal without the tendered amendment. Moreover, for such amendments necessary to avoid engineering conflicts, the major change provisions of Section 73.3572 of the Commission's Rules were waived where an adequate showing was made that a proposed increase in service area would be less than 50%. ACTS did not make a showing that its site change was necessary in order to avoid an engineering conflict with an existing broadcast station, as was required for a second group of amendments. Since ACTS's site change was not necessary to resolve an engineering conflict, the procedure for waiving the major change provisions did not become effective.

7. Accordingly, amendments to change transmitter site due to loss of the previously proposed site were not the types of amendments which came within either of the two groups of amendments which were acceptable for filing during the 90-day amendment period.[1] The site change proposed by ACTS was a major amendment, not required in order to alleviate interference with an existing broadcast station and, thus, was not acceptable for filing during the 90-day amendment period. It should be noted that ACTS's proposed site change would also be a major amendment under the Commission's current rules.

8. The *LPTV Report and Order* established a three tiered system for processing applications. Under the terms of this tiered process, ACTS's application was for a Tier III location (within 55 miles of the top 100 television markets). The *LPTV Report and Order* also continued the freeze on all new and major change amendments for all Tier II and III locations. Thus, applicants in Tier II and III locations were precluded from filing major change amendments under the freeze unless they came within the provisions of the *Public Notice*. Thousands of amendments were received during the 90-day amendment period. Many of these amendments were returned because they did not meet the criteria for acceptable amendments. In order to maintain the integrity of the Commission's processing procedures and to prevent ACTS's from receiving an unfair advantage over similarly situated applicants, the portion of its amendment to change site cannot be accepted.

9. Under the provisions of the 90-day amendment period, the portion of ACTS's amendment to change channel to avoid interference was acceptable; however, the portion to change sites was not acceptable.

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[1] ACTS claims in a letter that Commission staff orally advised its counsel that amendments to specify new transmitter sites due to site loss would be acceptable during the 90-day amendment period. Counsel's interpretation does not comport with the provisions of the *Public Notice*, nor does it differentiate between major and minor change amendments. In any event, the *Public Notice* set forth the stringent and limited criteria for acceptance of amendments.

Therefore, ACTS's application will be reinstated as modified for operation on channel 68 but at the originally specified site.[2]

10. Accordingly, IT IS ORDERED, that pursuant to Section 1.115 of the Commission's Rules, the Application for Review filed by American Christian Television System, Inc., IS GRANTED to the extent indicated above, and in all other respects, IS DENIED.

11. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail-Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[2] If ACTS cannot prosecute its application at the originally proposed site, it must, within thirty (30) days of the release of this order, submit a minor amendment, under the current Commission rules, proposing a new site or request dismissal of its application.

Common Carrier, Authorization

Order denied petition for stay based on public interest findings. —*AT&T Co.*

CC Docket No. 83-1375

FCC 84-442

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of American Telephone and Telegraph Co.: Provision of Basic Services Via Resale by Separate Subsidiary	CC Docket No. 83-1375

ORDER ON PETITION FOR STAY

Adopted: September 18, 1984; Released: September 24, 1984

BY THE COMMISSION:

I. Introduction

1. The Report and Order in this proceeding[1] authorized American Telephone and Telegraph Co. (AT&T) to provide basic services via resale through its separate subsidiary, AT&T Information Systems (ATTIS). This authorization became effective on August 16, 1984. Our order discussed public benefits from ATTIS resale in terms of (1) increased efficiency in one-stop shopping and single-system management for some customers; (2) increased efficiency in multi-customer sharing of basic services, and of customer-premises equipment or enhanced services combined with basic services; and (3) increased competition. We found that our regulatory tools, two reporting requirements, and market forces would be adequate to protect against cost-shifting, anticompetitive conduct, or unlawful rates resulting from ATTIS resale. We also found that any public costs from uneconomic bypass by ATTIS were speculative and outweighed by the public benefits of ATTIS resale.

2. On August 13, 1984, the United States Telephone Association (USTA) filed a petition for stay and an emergency petition for reconsidera-

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[1] 49 Fed. Reg. 28,835 (July 17, 1984).

tion of that order. We have received other petitions for reconsideration[2] and will address all petitions for reconsideration promptly after the time for oppositions and replies closes. This Order solely addresses the USTA petition for stay. Comments supporting the USTA petition for stay and emergency petition for reconsideration were filed by the Rural Telephone Coalition.

3. The USTA petition for stay stated that our order will cause substantial harm by permitting ATTIS to accelerate bypass of exchange carrier switched access facilities. According to USTA, ATTIS will use special access services to serve traffic that otherwise would use switched access services. Special access services make a lower contribution to the costs of non-traffic sensitive (NTS) exchange facilities than do heavily used switched access services. USTA claimed that the prices of switched and special access give ATTIS a strong incentive to use special access, and that ATTIS will be able to provide a MTS/WATS-like service by utilizing AT&T Communications' (ATCOM's) private lines in conjunction with special access. USTA stated that ATTIS has unparalleled ability to concentrate end-user traffic and will be a bypass provider of unexpected potency. Large-scale bypass would force exchange carriers to seek higher switched access charges and increase the burdens on users of switched access services.[3] USTA recommended that the Commission defer ATTIS resale until there is a pricing structure for switched access services that substantially eliminates the NTS "subsidy" from exchange carrier switched access rates.

4. The petition for stay cited the relevant standards for issuance of a stay set forth in *Virginia Petroleum Jobbers Ass'n. v. FPC*[4] and *Washington Metropolitan Area Transit Comm'n. v. Holiday Tours.*[5] USTA contended that (1) it is likely to prevail on the merits because the Commission gave inadequate consideration to the effect of ATTIS resale on bypass and on the Commission's access charge plan;[6] (2) exchange carriers will be irreparably injured absent a stay because of revenue deficiencies; (3) issuance of a stay would cause no substantial harm

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[2] Petitions for reconsideration were filed by USTA, GTE Service Corp., U.S. Telephone, United Telephone System, ISACOMM, Telesphere Network, Teltec Savings Communications and Satelco, BellSouth, RCA Communications, Bell Atlantic, and Pacific Bell and Nevada Bell.

[3] Concerns about bypass by ATTIS also were stated in petitions for reconsideration filed by GTE Service Corp., United Telephone System, Bell South, Bell Atlantic, and Pacific Bell and Nevada Bell.

[4] 259 F.2d 921, 925 (D.C. Cir. 1958).

[5] 559 F.2d 841, 842-44 (D.C. Cir. 1977).

[6] MTS and WATS Market Structure, CC Dkt. No. 78-72, Phase I, 93 FCC 2d 241 (1983), *reconsid.*, 48 Fed. Reg. 42984 (September 21, 1983), *further reconsid.*, 49 Fed. Reg. 7,810 (March 3, 1984), *aff'd sub nom.* National Association of Regulatory Utility Commissioners (NARUC) v. FCC, No. 83-1225 (D.C. Cir. June 12, 1984).

because it would preserve the *status quo* prior to the effective date of the order; and (4) the public interest requires issuance of a stay to avoid serious damage to exchange carriers and to foster a smooth transition in access charges.

5. ATTIS filed its opposition to the petition for stay on August 22, 1984. ATTIS claimed that USTA failed to satisfy any of the prerequisites for a stay. Regarding USTA's likelihood of prevailing on the merits, ATTIS alleged that the Commission fully considered the impact on bypass of ATTIS resale and correctly found it to be speculative; ATTIS has taken no steps to implement the type of private line bypass network suggested by USTA; and a stay of ATTIS resale would be contrary to the Commission's policies of addressing bypass by changing access charges rather than by stifling competition. Next, ATTIS contended that the exchange carriers will not suffer irreparable injury during the pendency of reconsideration petitions because ATTIS cannot quickly order and install a large-scale bypass network. Third, ATTIS claimed that a stay would send an irreparably damaging signal to its potential customers regarding ATTIS' ability to provide basic services. Finally, ATTIS asserted that a stay would jeopardize the competitive benefits and efficiencies found by the Commission, and is not necessary for the viability of exchange carriers or the Commission's access charge plan.

II. Discussion

6. We have repeatedly expressed our concerns about the growth of uneconomic bypass. Also, we are committed to developing new NTS cost-recovery procedures to avoid the harms to universal service and exchange-carrier viability caused by uneconomic bypass. Our decisions in *MTS and WATS Market Structure* discussed the available evidence of uneconomic bypass and ordered new NTS cost-recovery procedures (customer line charges and private line surcharges) to lessen uneconomic bypass.[7] High, non-cost-based usage-sensitive switched access charges promote uneconomic bypass through a variety of arrangements and transmission media, such as inefficient substitutions of special access for switched access. We rejected approaches that would stifle the development of efficient transmission arrangements, such as a prohibition on new services, new facilities, or special access services. In reviewing our access-charge decisions, the D.C. Circuit found our overall treatment of the bypass issue adequately reasoned.[8]

7. As we stated in February 1984, we intend to take further steps in December 1984 to decrease incentives for uneconomic bypass and its

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[7] *See, e.g.*, 93 FCC 2d at 252-53, 274-75; 48 Fed. Reg. at 42,996-43,000; 49 Fed. Reg. at 7,811-12, 7,824-26.

[8] *NARUC, supra*, slip op. at 45.

adverse impact on universal service; some changes should become effective through tariffs by June 1985.[9] On March 28, 1984, we requested additional data, information, and studies pertaining to bypass of the public switched network.[10] We are analyzing this information and assessing its implications for changes in NTS cost-recovery procedures.

8. Our order in this proceeding addressed comments which claimed that ATTIS would divert traffic from MTS and WATS to shared use of ATCOM's private line services.[11] We made three points about such actions and their harms to the public interest. First, in our review of exchange carriers' access tariffs, we reject provisions by which any interexchange carrier, including ATTIS, could use switched access services without paying switched access charges. Second, we are addressing the incentives for uneconomic bypass by any interexchange carrier or customer, including ATTIS, in *MTS and WATS Market Structure.* Other carriers can divert traffic away from switched access services to special access services or to total bypass of exchange carriers' services. We found that the problem of uneconomic bypass would not be solved by restricting ATTIS's authority to provide basic services via resale.[12] Finally, we found that the speculative costs of the claimed increment in uneconomic bypass caused by ATTIS resale do not outweigh the public benefits from ATTIS resale in terms of increased efficiencies and competition.

9. USTA's petition for stay repeats the general concerns about bypass that were expressed in some of the comments and addressed in our order. This petition presented no new information regarding the likely magnitude or timing of the claimed uneconomic bypass by ATTIS. Nor does this petition dispute the public benefits from ATTIS resale found in our order. On the other hand, ATTIS stated in its opposition that it has taken no steps to implement a large-scale private line bypass network and that it cannot quickly order and install such a network. Also, ATTIS supported the Commission's finding of public benefits from ATTIS resale.

10. We find that USTA failed to meet its burden of showing the prerequisites for issuance of a stay under the standard of *Virginia Petroleum Jobbers* and *Washington Metropolitan Area Transit.* We intend to address all petitions for reconsideration promptly, including USTA's and others which discuss bypass concerns. In this context, a stay is not warranted because USTA failed to show irreparable injury will occur before we can adopt a reconsideration order. This failure of proof

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[9] 49 Fed. Reg. at 7,813.

[10] Public Notice No. 3206 (March 28, 1984). *See also* 49 Fed. Reg. at 7,812.

[11] 49 Fed. Reg. at 28,842.

[12] "We do not believe that restricting ATTIS' offerings while OCCs provide the same purportedly-undesirable services increases the long-term viability of exchange carriers and universal service." *Id.*

applies to the claimed irreparable injury to exchange carriers, customers using switched services, and the Commission's access charge plan. USTA did not point to the current number of ATTIS orders for special access services or examples of ATTIS actually ordering special access to supply large customers with a replacement for switched services. Yet, USTA's members should have such information, if it exists, in their control. Nor did USTA present evidence of current ATTIS marketing efforts to recruit many customers for large-scale private line networks as substitutes for MTS/WATS services. Even if we were to accept USTA's characterization of ATTIS resale as threatening large-scale uneconomic bypass, USTA's petition gives no basis for believing that irreparable injury will result in the next few months.

11. Furthermore, we disagree with USTA's claim that it is likely to prevail on the merits because the Commission gave inadequate consideration to the effect of ATTIS resale on bypass and on the Commission's access charge plan. As described *supra,* we did consider the bypass concerns raised by USTA in our order. While we do intend to give this matter further study after reviewing all the pleadings submitted on reconsideration, we have not been persuaded on the basis of the petition for stay that our decision was arbitrary or capricious as a matter of law. If some alterations in our order prove warranted on reconsideration, our action here will not prevent us from making those changes in the reconsideration order.

12. We also believe that a stay may produce substantial harms if on reconsideration we affirm our findings. We found that customers would benefit from the increased efficiencies and competition resulting from ATTIS resale. Some customers may have already entered into arrangements with ATTIS. A stay would disrupt these arrangements and be costly for these customers. Other customers may also suffer if ATTIS cannot compete to meet their demands during a stay. Of course, a stay also would harm ATTIS by interrupting its marketing efforts and causing it to lose goodwill. In sum, we find that the public interest weighs against a stay.

13. While we deny USTA's petition for stay, we conclude that we should collect information on ATTIS's orders for, and leases of, special access lines. This information will help us determine whether ATTIS is beginning to engage in the type of large-scale bypass alleged by USTA and some other parties in this proceeding. If this information indicates that the massive problems forecast by USTA are developing, we will take this information on actual developments into account in our reconsideration order. Useful information should be available from ATTIS without a great cost burden on it, and without requiring it to reveal confidential or competitively-sensitive information.

14. Accordingly, ATTIS must file a monthly report[13] showing the number of (voice-grade equivalent) special access lines that it leases, and special access lines that it has on order (not yet installed). These figures should include lines ATTIS leases or orders directly from exchange carriers as well as lines ATTIS leases or orders via an interexchange carrier such as ATCOM. These reports will supplement those which we required ATCOM to file on its services to ATTIS,[14] and should cover lines that ATTIS has leased or ordered from all carriers. We recognize that ATTIS uses special access lines for enhanced services and intra-corporate communications, not just basic services. It would not be useful to try to segregate those lines used by ATTIS for basic services from lines it used for other purposes; some lines are used for a mix of services and the additional data analysis can be expensive. Instead, we require that ATTIS file these data for August 1, 1984, as a baseline (before our order authorizing ATTIS to provide basic, resold services became effective).

III. Ordering Clause

15. Pursuant to our authority under 47 U.S.C. §§ 154(i) and 219(b), IT IS ORDERED that USTA's petition for stay is DENIED and that ATTIS is required to file the monthly reports specified in this order. The Common Carrier Bureau has delegated authority to specify the content and format of these reports.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[13] A monthly report should reflect the status as of the first day of each month, and should be filed by the end of that month. As explained in the text, ATTIS should report data for August 1, 1984, and each month thereafter. It's first report should be filed by October 15, 1984.

[14] 49 Fed. Reg. at 28,840. Requiring ATTIS to file reports on the lines it orders and leases should provide us with this information with less expense than if we required each exchange and interexchange carrier to report on its lines leased or ordered by ATTIS. Nevertheless, we expect that these carriers will notify us if they believe that ATTIS's reports are inaccurate based on their own information. The Common Carrier Bureau should work out the contents and format of ATTIS's reports to minimize ATTIS's burdens.

Application, Amendment of
Application, Dismissal of
Business Radio Service, Frequencies
Dismissal of Application
Frequency, Efficient Use of
Rules, Failure to Conform

Memorandum Opinion and Order adopted affirming decision of Private Radio Bureau to dismiss application of Bellar Communications, Inc. for failure to satisfy requirements of Section 90.627 of Commission's rules.
—*Bellar Communications, Inc.*

FCC 84-593

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Application for Review of	
Bellar Communications, Inc. for a five channel 800 MHz Trunked SMR system in Dallas, Texas	(File No. 507390-yx-122**)

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1984; Released: December 6, 1984

BY THE COMMISSION:

1. The Commission has for consideration Bellar Communications, Inc.'s (Bellar) Application for Review of a Private Radio Bureau Order issued April 5, 1984. The Order denied Bellar's Petition for Reconsideration of the Bureau's August 30, 1983, dismissal of Bellar's application, referenced above, for a five channel trunked Specialized Mobile Radio System (SMRS) in Dallas, Texas. The Order also denied Bellar's Motion for Stay of the application's dismissal pending determination of the Petition for Reconsideration.

2. In its Application for Review, Bellar asks that the Bureau's Order be reversed and that Bellar's application be reinstated or, in the alternative, that Bellar be permitted to amend its application to provide

for a transmitter site 40 miles removed from the site of its SMRS station KNDC-223 and that the amended application be included among those applications presently on file for new frequencies in the Dallas area. Bellar also seeks review of the denial of the Motion For Stay.

Background

3. Bellar filed an application for a 20 channel 800 MHz trunked SMRS in Dallas on September 30, 1980. Because no frequencies were then available for assignment in the Dallas area, the application was placed on a waiting list to be considered in the event frequencies later became available[1]. In July of 1982 we adopted our *Second Report and Order* in PR Docket No. 79-191 and made additional frequencies in 800 MHz available[2]. In that *Second Report and Order* we determined that future trunked SMRS grantees would only be authorized five channels at a time, whether their frequencies were made available from the existing or the newly opened frequencies. We also decided to allow those applicants on the waiting list for existing frequencies to remain on the list and to apply for new frequencies, thereby being permitted two applications for the same system.[3] When the Bureau began accepting applications for the new frequencies, Bellar filed the referenced application for a five channel SMR station in Dallas, to be located at the same site as the system for which it already had an application on the waiting list.

4. As a result of the Bureau's channel recovery program, old channels became available in Dallas. Bellar's waiting list application was duly granted, on April 13, 1983, for a five channel system. That system, KNDC-223, is presently being operated by Bellar. On August 30, 1983, Bellar's other application was dismissed by the Bureau.[4] Bellar filed a Petition for Reconsideration of the Bureau's dismissal on September 28, 1983. The Bureau denied the petition on April 5, 1984.

Discussion

5. Bellar contends that the Bureau erred in dismissing its second application once the first application was granted. It argues that we intended that applicants on the waiting list for old frequencies should have access to both old and new frequencies when we adopted the *Second Report and Order* in PR Docket No. 79-191. According to Bellar, this meant that such applicants had the right to have their applications for old

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[1] See, *Land Mobile Radio Service*, 46 FCC 2d 752, 770 (1974), for the procedures to be followed when frequencies were not available.

[2] 90 FCC 2d 1281 (1982).

[3] Id. at 1314-15

[4] Rule 90.627(b) provides, with limited exceptions, that "[n]o licensee will be authorized an additional trunked system within 40 miles of an existing system, except where: . . . (2) The licensee's existing trunked system(s) is loaded to at least 80% of authorized capacity."

and new frequencies remain on file until they were granted or barred from further consideration by not being eligible for a grant at the time frequencies became available. Thus, Bellar argues that although its first application was granted, its application for new frequencies should have been permitted to remain on file until such time as the new frequencies were ready to be assigned in Dallas. Then, if it met the requirements for additional frequencies it should have been granted and if it did not it should have been dismissed.

6. Bellar's interpretation of our Report and Order with respect to applicants on the waiting list for old frequencies is incorrect. The purpose of allowing the filing of multiple applications by waiting list applicants was to permit them an opportunity to satisfy their frequency requests by competing equally with everyone else for the about-to-be released spectrum. Otherwise they would have been precluded from filing applications because they were on the waiting lists, and grants from the waiting list were dependent on the applicant's position on the list and the degree of success of those entrepreneurs who already had SMR systems in that geographical area. Waiting list applicants therefore were also permitted to file for new frequencies. We did not state, nor did we imply, that the other rules governing SMRS applications would not apply. Nothing in the October 12, 1982, Public Notice No. 166, "Procedures for 800 MHz Private Land Mobile Applications," cited by Bellar, or in our reconsideration of the *Second Report and Order*, changed or added to that language. The equity which waiting list applicants received was precisely that stated in our *Memorandum Opinion and Order* on reconsideration:

> Under the approach adopted in the *Second Report and Order*, previous applicants could retain their place in line for channels from the original 200 channel trunked allocations, *and* could apply for a grant from the 80 new channels released for SMR systems. *Memorandum Opinion and Order* PR Docket No. 79-191, 48 Fed. Reg. 51917 (November 15, 1983) at para. 51 (emphasis added).

Thus, waiting list applicants were permitted to file two applications for a trunked system. We did not provide that once one of the applications was granted, the other one could still remain on file, contrary to the provisions of Rule 90.627(b).

7. Bellar has not been treated any differently than any other waiting list applicant who also had an application on file for new frequencies. To qualify for new frequencies to add on to its existing system, Bellar, like every other SMRS licensee, had to have its assigned frequencies loaded to 90% of capacity[5]. Once Bellar's waiting list application was granted, its

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[5] 90 FCC 2d at 1315. On reconsideration, we reduced this requirement to 80%. *Memorandum Opinion and Order*, PR Docket No. 79-191, 48 FR 51917 (November 15, 1983). However, we did not make this standard retroactive and it did not change the requirements for applicants who had filed during the November 15 - December 15, 1982, window.

other application was contrary to the rules because it now had a grant of frequencies which it had not loaded. Its other application was therefore dismissed. In the *Leascom*[6], *Carrier Communications*[7], *Comtran Associates*[8], and *Big Rock Communications*[9] cases we determined that applications seeking new frequencies to add to existing systems had properly been dismissed because the existing systems were not loaded at the close of the filing window. We stated that subsequent loading after the close of the filing window did not entitle them to have their applications reinstated. In deciding these cases, we said:

> Any other interpretation, we believe would be nonsensical. It would require us to process defective applications on the mere chance that the defect might be cured before the time of actual authorization. Such a processing scheme would be administratively inefficient, if not completely unworkable. Moreover, it would be inconsistent with our policy of affording all applicants the same time period within which to load their systems. *Leasecom*, at para. 10; *Carrier*, at para. 10; *Comtran*, at para. 13; and *Big Rock*, at para. 10.

That same rationale applies with equal force to this case.

8. Bellar would require us to keep its second application on file, include it in the lottery, award it a number and, if it were a winner and if on the date we processed the application for final grant it did not meet the 80% loading standard then we would dismiss its application as defective. As already noted, our intention was to allow waiting list applicants two possible avenues to obtain frequencies since the chances of a grant from the waiting list were uncertain. Once either application was granted, however, we had no intention of allowing the licensee to also keep the second application alive while it attempted to load the newly obtained channels.

9. For the same reason, we cannot permit Bellar to amend its application to apply for a new system which is not within 40 miles of its present system and retain its position in the lottery. Bellar has not presented any unique or unusual circumstances for waiving the Rules, and we cannot give Bellar an advantage over all of the other applicants for new frequencies whose applications have been dismissed because they did not comply with Rule 90.627(b)[10]. Bellar could have filed its original application for a system more than 40 miles from its present system, but

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[6] FCC 84-263 (released July 10, 1984)

[7] FCC 84-264 (released July 10, 1984)

[8] FCC 84-265 (released July 10, 1984)

[9] FCC 84-266 (released July 10, 1984)

[10] See, *Memorandum Opinions and Orders* in the Detroit, Michigan and Cleveland, Ohio, 49 Fed. Reg. 20067 (May 11, 1984), in the New York, Philadelphia, Baltimore and Washington, D.C., 49 Fed. Reg. 35862 (September 12, 1984) and in the Chicago, Dallas and Houston, 49 Fed. Reg. 37464 (September 24, 1984), lottery proceedings, where applications were dismissed for the same reason.

chose not to. It can still file such an application and have it placed on the waiting list.

Conclusion

10. Accordingly, Bellar's Application for Review and Motion for Stay are DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Emergency Relief, Petition for Issue, Clarification of

Review Board denied motion for emergency relief to clarify scope of remanded issues. Request for clarification should be addressed initially to ALJ.
—*California B/cing Corp.*
BC Docket No. 80-698

FCC 84R-77

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications	
California Broadcasting Corporation Ventura, California	BC Docket No. 80-698 File No. BPCT-790130LP
Channel Islands Television Corporation Ventura, California	BC Docket No. 80-699 File No. BPCT-790130LQ
For a Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 1984; Released: October 31, 1984

BY THE REVIEW BOARD:

1. The Review Board has under consideration an "Emergency Motion for Immediate Relief" filed October 23, 1984, by California Broadcasting Corporation (CBC) requesting that the Board clarify the scope of the issues remanded to the presiding Administrative Law Judge (ALJ) in this proceeding by our *Memorandum Opinion and Order* released August 30, 1984. FCC 84R-60. CBC represents that initial discovery responses are due October 29 and 30 requiring, therefore, immediate guidance from the Board. In view of the time factors involved here, the procedural posture of this case warrants *ex parte* disposition of this motion without waiting for the filing of responsive pleadings. *See* Section 1.298(a) of the Commission's Rules, 47 CFR §1.298(a).

2. The motion will be dismissed. It is well established that requests for clarification of issues should be addressed initially to the presiding ALJ. *See Talton Broadcasting Co.*, 59 FCC 2d 413 (Rev. Bd. 1976). Appeals from such rulings are considered only if allowed by the ALJ. *See* Section 1.301(b). If consent is not obtained, objection to the ruling may be raised later on review of the initial decision. *See* Section 1.301(b)(1). Here, it does not appear that any reviewable action has yet occurred since the ALJ has not been called upon for a ruling. Thus, CBC's motion will be dismissed as premature and unauthorized. *See Arcatel Inc.*, 92 FCC 2d 893 (Rev. Bd. 1982).

3. ACCORDINGLY, IT IS ORDERED, That the "Emergency Motion for Immediate Relief" filed October 23, 1984, by California Broadcasting Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

Satellite, Direct Broadcast

Where contract to build satellites is signed prior to due diligence deadline, but contains significant contingencies, and where disqualifying nature of such contingencies is only recently expressed, post-deadline efforts will be considered and permittee will not have permit canceled on basis of contingencies. Rather, launch authority will be granted, but specific channel and orbital assignments will not be made until contingencies are satisfied or removed.
—*CBS, Inc.*

Satellite, Direct Broadcast

Extension of the due diligence deadline is not warranted to allow a conditional permittee to await another Commission proceeding concerning its fitness as a licensee, where the permittee has made no unequivocal commitment to proceed with the system even in the event of a favorable disposition in the pending proceeding.
—*CBS, Inc.*

Satellite, Direct Broadcast

Conversion from half-CONUS signals to full-CONUS signals is not a major amendment and will be permitted where technical analysis indicates that it will not impose constraints on the Region 2 Plan, despite its nonconforming nature. Requests for different channels and orbital positions are not major amendments and will be granted where the requested channels and positions are available and no other party is prejudiced.
—*CBS, Inc.*

FCC 84-477

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

CBS, Inc.
Direct Broadcast Satellite Corporation
Graphic Scanning Corporation
RCA American Communications, Inc.
Western Union Telegraph Company

For Modification of Construction
Permits to Establish Interim
Direct Broadcast Satellite Systems;

Satellite Television Corporation
Dominion Video Satellite, Inc.
United States Satellite Broadcasting Co. Inc.

For Further Modification of Construction
Permits for Interim Direct Broadcast Satellite Systems.

File No.
DBS 81-02-MP
File No.
DBS 81-03-MP
File No.
DBS 81-05-MP
File Nos.
DBS 81-06-MP,
DBS 84-06
File No.
DBS 81-09-MP

File No.
DBS 81-01-MP
File Nos.
DBS 81-08-MP,
DBS 84-05
File Nos.
DBS 81-07-MP,
DBS 84-07

MEMORANDUM OPINION AND ORDER

Adopted: October 9, 1984; Released: October 10, 1984

BY THE COMMISSION:

1. In 1981, the above-captioned parties filed applications for construction permits for Interim Direct Broadcast Satellite Systems pursuant to

Notice of Proposed Policy Statement and Rule Making in General Docket No. 80-603, 86 FCC 2d 719 (1981). Their applications were each granted, conditioned, in part, on the outcome of the 1983 Region 2 Administrative Radio Conference ("RARC-83"), each permittee's conformance to the Final Acts of RARC-83, and each applicant's "due diligence"[1] in constructing its proposed system. *CBS, Inc. et al.*, 92 FCC 2d 64 (1982). After the conclusion of RARC-83 and the issuance of its Final Acts, the Commission set a time period, until January 5, 1984, for applicants to modify their previously granted permits to specify performance within the parameters of the Final Acts and to request specific channel and orbital assignments from among those allotted to the United States by RARC-83. It also extended until July 17, 1984, the deadline by which permittees would be required to demonstrate due diligence. *In re Processing Procedures Regarding DBS Service* ("*DBS Processing Procedures* "), 95 FCC 2d 250 (1983). It is these modification applications by the first-captioned parties and their due diligence demonstrations, as well as associated comments by other parties, which are first considered here.

2. Three permittees already have demonstrated due diligence and received orbital and channel assignments, and have filed requests for further modifications for their systems as granted. Satellite Television Corporation (STC) has requested authority to double its signal area to full-CONUS (entire continental United States), instead of half-CONUS as authorized, and has requested a relocation of its authorized satellites from 101°W to 110°W. United States Satellite Broadcasting Company, Inc. (USSB) and Dominion Video Satellite, Inc. (Dominion) have each requested authorization to transmit on two additional channels from each of their authorized satellites. USSB also has requested a change in the orbital and channel assignments it has received. These requests are also considered herein.

CBS, Inc.

3. On June 28, 1984, CBS, Inc. notified the Commission that it had decided to discontinue planning for immediate entry into DBS and will not execute a DBS construction contract "in the near future". Accordingly, its application will be dismissed and its construction permit canceled.

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[1] Section 100.19(b) of the Commission's rules requires that an Interim DBS permittee must begin construction or complete contracting for construction of its satellite within one year of the grant of a construction permit, and that the satellite must be in operation within six years of that grant. 47 C.F.R. §100.19. *See also, CBS, Inc. and Dominion Video Satellite, Inc.*, FCC 84-275, released June 18, 1984.

Direct Broadcast Satellite Corporation

4. On April 3, 1984, Direct Broadcast Satellite Corporation (DBSC) advised the Commission that it had signed a contract with Ford Aerospace (Ford) on April 2, 1984, for the construction of two satellites for its proposed DBS system. DBSC included a copy of the press release it had issued proclaiming that fact. On April 6, 1984, DBSC claimed that this showing constituted a sufficient due diligence demonstration. That showing was rejected on the basis that insufficient information was provided regarding the terms of the contract in *CBS, Inc. and Dominion Video Satellite, Inc., supra* at n.30. On July 6, 1984, DBSC filed a copy of its contract with Ford, along with a letter from Ford, which, it claimed, contained all of the essential elements to constitute "completion of contracting for construction" of its satellites to satisfy its due diligence requirement. At the same time, it bolstered its due diligence claim with its assertions that it had already paid a non-refundable deposit of $200,000 to Arianespace to secure two launch reservations, that it had made major contributions through its involvement in United States preparation for and participation in the 1982 Region 2 Administrative Radio Conference, and that on March 5, Wold Communications ("the largest reseller of satellite transponders in the United States") agreed to market its transponder capacity. On September 17, DBSC filed a September 13 amendment to its contract, with an explanatory letter from Ford reaffirming its understanding that the contract represents a binding commitment. At the same time, DBSC filed its "memorandum of understanding" with Arianespace, pursuant to which it expects to finalize a contract for launch services, including a provision for the initiation of the first year's launch vehicle construction on immediate credit terms. It also reiterated its previous assertions regarding its efforts in the advancement of its own system and DBS service generally, and added the claim that it has already invested over $2 million in the prosecution of its application, as further evidence of its commitment.

5. The DBSC/Ford contract sets forth in detail the design characteristics, performance specifications and equipment requirements of the subject satellites, the construction schedule and the payment terms and schedule, as well as performance and operation incentives, and indemnity and deficiency provisions. It appears to be complete in every respect. However, in its original form it provided that the construction and payment schedules specified in the contract would not commence until certain financial guarantees were arranged by DBSC. In response to the Commission's declaration in *CBS, Inc. and Dominion Video Satellite, Inc., supra*, that it would not accept contingencies which "could preclude substantial construction of the satellite," DBSC has now attempted to modify the nature of its contract by providing for the initiation of work by

Ford on a pay-as-you-go basis until the more secure financial guarantees are arranged to initiate the specified construction and payment schedules. It also provides for discontinuation of the contract and a substantial penalty in the form of liquidated damages in the event that the specified financial arrangements are not secured by March 31, 1985 - further evidence of its commitment, according to DBSC.

6. In its latest filing, DBSC contends that it is entitled to a due diligence finding, as it has had a construction contract since April 2, 1984. It argues that its efforts and its contract fulfill both the spirit and the letter of the requirement as it was initially formulated. It insists that *CBS, Inc. and Dominion Video Satellite, Inc., supra,* effectively changed the due diligence standard by demanding, for the first time, "financial qualifications" for DBS applicants or permittees. It contends that additional time must be afforded to meet this new standard, and that it has now "substantially" met the standard.

7. The due diligence standard was adopted by the Commission, among other reasons, as a method for applicants to receive construction permits on a conditional basis, without a prior stringent financial showing of the magnitude required for a DBS system, so that they could then raise the necessary financing for their systems.[2] A limited time period is applied to ensure the prompt and effective utilization of the orbit/spectrum resource.[3] This is especially significant where, as here, other applicants are waiting to serve the public. That standard was not "changed" in *CBS, Inc. and Dominion Video Satellite, Inc., supra.* That case merely reiterated what should have been clear all along - that a contract to build a satellite, in order to satisfy due diligence, means a contract to build a satellite definitely and immediately. The strictness of our enforcement was already indicated in *CBS, Inc., et al., supra*, and in *DBS Processing Procedures, supra* at 254. There the Commission also specifically stated its concern over the rights of other first- and second-round applicants. However, it is arguable that DBSC could have misinterpreted the Commission's meaning of "complete contracting for construction." It did have a "construction contract" well prior to the July 17 deadline. Furthermore, that contract contained extensive specifications, reflecting the engineering and design work already performed for DBSC's system. In addition, DBSC has made other significant and continuing efforts to advance its system and the DBS industry generally. The Commission therefore will not conclude that DBSC's construction permit should be canceled for failure to meet its due diligence obligation. Considering all of these factors, DBSC will be awarded construction and launch authority and the reservation of the channels and orbital positions required for its system. However, specific

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[2] *Report and Order* in Gen. Docket No. 80-603, 90 FCC 2d 676, 719 (1982).

[3] *CBS, Inc., et al., supra* at 108.

channels and orbital positions will not be assigned at this time. This is not the usual procedure the Commission has followed and will follow in the future in making DBS assignments, but this is not the usual case. As has been explained, DBSC has made timely efforts which warrant the approval of its system and the authorization to construct and launch, as well as the coincident reservation of channels for its system. However, we are concerned that under DBSC's contract, definite payment and construction schedules appear to depend on payment of a specified cash sum and presentation of letters of credit by March 31, 1985. Because of this, where other applicants are awaiting Commission authorization for their opportunity to begin constructing, and may construct more expeditiously than DBSC presently appears prepared to, it would be unfair to those parties to assign specific channels and orbital positions at the present time. When these provisions are satisfied, specific channels and orbital positions will be assigned. DBSC will be required, as all other permittees have been and will be, to submit periodic progress reports. In DBSC's case, since its contract may expire before the usual six-month reporting period, its first report will be required on April 5, 1985, to respond to the March 31 contract expiration date. DBSC will specifically be required to demonstrate that it has removed or satisfied the financial commitments required to initiate the firm construction and payment schedules by March 31, 1985. Failure to do so will result in the immediate cancelation of its permit.

8. At the same time, we stress that it is now eminently clear, and all applicants and permittees are on notice, that a contract with a contingency such as DBSC/Ford's will not satisfy the due diligence requirement in the future. Neither party would be sufficiently committed to the completion of construction of the satellites. That interpretation is clearly and forcefully emphasized here. To find that such a contract constitutes due diligence in the future would eviscerate the important concept of the due diligence standard. Permittees who are unable to meet the demands a contractor requires within the specified time could enter into such an agreement to proceed at some time in the future, with no significant current obligation, effectively tying up the orbit/spectrum resource and unduly delaying institution of DBS service to the public.

9. In its timely filed modification application, DBSC requests the assignment of ten channels to each of two satellites, with each satellite serving two time zones. Each satellite would deliver six channels covering the respective half-CONUS (continental United States) area, as well as four channels covering each of three small, discrete geographic areas ("spot beams") to be determined according to customer demand.[4] This

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[4] DBSC did express an interest in full-CONUS signals, but did not include a proposal for such service. Also, in opposing some of the modification applications of other DBS permittees, DBSC stated that if those modified proposals were approved, it would be

proposal does not vary in any significant respect from the construction permit application conditionally granted by the Commission in *CBS, Inc., et al.*, 92 FCC 2d 64 (1982), and proposes compliance with the technical parameters established at the Region 2 Administrative Radio Conference.[5]

10. DBSC has not made a specific proposal for its tracking, telemetry, and command ("TT&C") functions, and has not made application for an earth station or uplink facilities to supply programming signals to its satellites. DBSC's proposed system, including its "spot beam" service will be approved and its requested number of channels and orbital positions reserved. In granting DBSC's conditional construction permit and initially approving its proposal, the Commission expressed a reservation concerning the efficiency of channel utilization by spot beams, and stated that any such assignment will be subject to "sufficient spectrum availability." *CBS, Inc., et al., supra* at 104. Given the fact that immediate demand for all DBS channels is not definite at this time and the opportunity that spot beam usage will represent a novel application of the technology, approval of this service is appropriate at present. The Commission has repeatedly stated the critical importance of permitting flexibility in the development of technology and the offering of services in the rapidly evolving DBS industry. Nonetheless, DBSC is explicitly advised that when the renewal of its system is considered, the Commission will specifically reevaluate the availability of DBS spectrum at that time and the advisability of this limited dedication of four channels. There will be no presumption that this aspect of DBSC's service should be renewed.

Graphic Scanning Corporation

11. On July 17, 1984, Graphic Scanning Corporation (Graphic) submitted a statement which, it asserted, demonstrates its due diligence toward implementing its proposed DBS system, and requested an extension until June 1, 1985, for the execution of a satellite construction contract. Graphic first noted that its conditional construction permit is subject to the outcome of a case involving applications in the Domestic Land Mobile Radio Service in which "a substantial issue has been raised as to whether Graphic exercises *de facto* control over [the] applicants, and thus, is the

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entitled to five additional channels per satellite. Again, DBSC did not include a proposal for such service and any such request would be untimely, whether now or when initially proposed. *See, CBS, Inc. and Dominion Video Satellite, Inc., supra* at para. 9; *infra*, at paras. 16 and 17. Accordingly, no consideration of either "request" is undertaken here.

[5] DBSC has eliminated its proposal to serve Alaska and Hawaii, noting that such service is not included in the Region 2 Plan from the orbital positions preferred by DBSC. Also, DBSC has reduced its system from three satellites (each serving third-CONUS) to two satellites (each serving half-CONUS), thereby using less of the orbit/spectrum resource than originally planned while providing the same amount of service.

real party in interest. . . ." *A.S.D. Answer Service, Inc., et al.*, 47 Fed. Reg. 40896 (October 16, 1982). Graphic's DBS construction permit grant was conditioned on any action the Commission might deem appropriate after its decision is rendered in that case. *CBS, et al., supra* at 110, n. 88. The case has been argued and findings have been filed by the parties, but an initial decision has not yet been issued. Graphic contended that in order to proceed with the substantial investment required to begin a DBS operation, it must have a reasonable expectation that it will be able to operate its system without impairment by future Commission action as a result of an unfavorable resolution of the issues in the *A.S.D.* case.

12. Graphic contended that it has nonetheless demonstrated its willingness and desire to proceed with its DBS venture by beginning discussions with all satellite builders soon after its initial grant, culminating in a proposal to Graphic by RCA Astro-Electronics. It claimed that it has attempted to reach a contract agreement with RCA Astro-Electronics that would provide for resolution of the *A.S.D.* contingency before the parties would be finally committed. However, Graphic and RCA Astro-Electronics "have been unable to resolve how the fundamental issue presented by [*A.S.D.*] can, to the satisfaction of both parties, be recognized in the contract." Graphic letter at p. 1. Graphic proposed to advise the Commission within forty-five days of an initial decision, and in no case later than June 1, 1985, whether it will enter an unconditional construction contract.

13. On July 25, 1984, Satellite Syndicated Systems, Inc. (Syndicated) filed a letter opposing Graphic's request.[6] It argued that Graphic has not made an unequivocal commitment to proceed with its system and that the outstanding *A.S.D.* case is just a part of the business judgement it must make. It contends that a finding of due diligence or a grant of an extension of the construction permit under these circumstances is unfair to permittees who have already complied or who have withdrawn their applications, and prejudicial to second-round applicants. On September 25 and 26, 1984, Graphic filed letters indicating that an agreement had been reached between it and RCA Astro-Electronics and that a contract for satellite construction would be signed immediately.[7]

14. We cannot find that Graphic has met the due diligence condition of its DBS construction permit. The Commission has previously stated that

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[6] Syndicated is a "second-round" applicant for a construction permit for a DBS system, whose application (DBS 83-01) will be considered with the other second-round applications after this Order's disposition of all of the "first-round" permittees.

[7] On October 3, 1984, Hughes Communications Galaxy, Inc. (Hughes Galaxy), another second-round DBS applicant, requested that the Commission not consider the Graphic letters as establishing, or leading toward the establishment of, Graphic's due diligence. It asserts that Graphic's filings are untimely, would destroy valid and established processing procedures and would be prejudicial to the rights of second-round applicants.

exceptions to the due diligence rule will not be allowed, except in the "most extraordinary circumstances." *DBS Processing Procedures, supra* at 254. The rule was intended to ensure the prompt initiation of DBS service for the public, and must be enforced where permittees are allowed to hold spectrum resource for which other applicants exist, as here. We need not determine whether the uncertainty arising from the *A.S.D.* case might have affected our consideration of Graphic's position if Graphic and a satellite manufacturer had entered into a binding commitment to proceed in the event of a favorable disposition in the *A.S.D.* case, as such is not the case here. Graphic did not timely show an ability and willingness to commit itself to its DBS system. It had over one and one-half years to negotiate and complete a contract, which it did not do. Other parties which having been unwilling to commit themselves in a timely fashion to proceed have voluntarily withdrawn their applications in anticipation of the Commission's adherence to its stated rule. To reach a contrary result under these circumstances would also be unfair to those parties. Accordingly, Graphic's application will be dismissed and its construction permit canceled.

RCA American Communications, Inc.

15. On July 3, 1984, RCA American Communications, Inc. ("RCA") filed a "Request for Amendment of Application." In this amendment, RCA states its assessment that a launch later than originally proposed would coincide more closely with the development of optimum market conditions for DBS, and proposes a first satellite launch at the end of 1989, with a second satellite launch two years later. It concludes: "We recognize that the changes we are proposing will be considered as a part of the next DBS processing group." RCA Amendment at p. 7.

16. RCA has not attempted to meet the due diligence condition of its original construction permit. Accordingly, its permit must be canceled. Its Request for Amendment together with its original application and modification will be treated as a new application and assigned a new file number. Syndicated has argued, in a letter of August 1, 1984, that the rights of second-round applicants, whose proposals have been "premised on certain expectations based on" the first-round applications and modifications, would be violated if RCA's new application is considered with the existing second-round applications. Syndicated cites the Commission's decision in *CBS, Inc. and Dominion Video Satellite, Inc., supra* at para. 9. On September 21, 1984, RCA Americom advised the Commission that it has a prospective DBS client and requested that its application, as modified, be considered with the second round of DBS applications. It claims that it must have DBS capacity by a date certain in order to conclude negotiations, and contends that it can be accommodated without prejudice to other permittees and applicants. Hughes Galaxy opposed

RCA Americom's request on October 3, 1984, stressing the importance of the Commission's strict adherence to its cut-off procedures.

17. RCA Americom could have refiled for second-round status had it filed before the second-round cut-off date. Its decision to not pursue its DBS permit in a timely manner was due to its own evaluation of current market conditions for DBS, which, it clearly stated, did not warrant prompt action. The cut-off date came and went with RCA Americom's full knowledge and implicit decision not to include itself with that round of applicants. Even as late as August, it did not see fit to oppose Syndicated's pleading. Its change in circumstances cannot retroactively change that decision or its consequences. To now consider its application as a second-round proposal, after it voluntarily missed its due diligence deadline and the cut-off date would violate the rights of the other permittees and applicants and effectively destroy the Commission's very necessary processing rules with no countervailing benefit. The time period for filing applications to be considered in the second group of applicants expired on January 12, 1984, and RCA's application will thus be considered after disposition of the second group of applications.[8]

Western Union Telegraph Company

18. On July 10, 1984, Western Union Telegraph Company notified the Commission that it will not further pursue its instant DBS application. Accordingly, its application will be dismissed and its construction permit canceled.

Satellite Television Corporation

19. On May 10, 1984, STC was granted authority to build and launch two satellites, with each satellite transmitting three channels to the eastern half-CONUS. STC was assigned orbital position 101°W for both satellites, and channels 6, 8, 10, 12, 14, and 16 at that position.[9] *Satellite Television Corporation*, FCC 84-208. On July 17, 1984, STC filed a request for further modification to permit full-CONUS transmission for each of the three channels on each of the satellites already authorized, and to relocate those satellites to 110°W. STC asserts that this operation would be consistent with the interference parameters established at

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[8] In its amendment, RCA modified its proposal to request two sixteen-channel satellites, rather than the four six-channel satellites previously requested and approved. It requested that each satellite serve half-CONUS from 110°W, rather than the quarter-CONUS service from four different locations originally proposed. It also proposed a decrease in operating power from 230 watts per channel to 100 watts per channel. It stated that these changes would result in a reduction in overall system cost of over 40%, with the per transponder cost reducing even more dramatically. It claims that these benefits will accrue to the public in reduced fees and increased diversity of programming.

[9] It was also granted a reservation of six channels at a suitable location for western service, provided its initiation of construction for such a spacecraft were begun promptly.

RARC-83, and has filed analytic data in support. It claims that as no additional spectrum usage is involved, this change constitutes a minor modification.

20. Technical analysis confirms STC's assertions and indicates that full-CONUS service, as proposed by STC, will not impose constraints on the Region 2 Plan adopted at RARC-83. Of particular concern is the transmission into the western United States of a signal from a position planned for eastern service. Use of a computer model indicates, however, that within the parameters proposed by STC, its proposed service would not impose constraints on the Region 2 Plan. This evaluation takes into consideration the nonconforming use already conditionally approved for Dominion at 119°W. *CBS, Inc. and Dominion Video Satellite, Inc., supra.* Sufficient flexibility remains that even if an ultimate adjustment in the computer model by the International Frequency Registration Board or practical experience indicates some minor problem, STC can resolve the problem by minor modification of its operation. Accordingly, authority for such an operation will be granted, with the condition that STC will be subject to any limitation on its operation which may appear necessary after final analysis or upon practical experience in operation. STC's related request to have its orbital position changed from 101°W to 110°W will also be granted. These changes do not entail the use of any additional orbit/spectrum resource and the position is available, and no other parties have taken action which would be prejudiced by this grant. The analysis of STC's full-CONUS proposal was based on operation from 110°W.[10]

Dominion Video Satellite, Inc. and United States Satellite Broadcasting Company, Inc.

21. On July 19, 1984, Dominion Video Satellite (Dominion) was granted authority to build and launch two satellites, with each satellite transmitting six channels for half-CONUS service. Dominion was assigned orbital position 119°W for both of its satellites, and channels 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, and 28 at that position. A June 19, 1984 request by Dominion for two additional channels for each of its satellites was not disposed of at that time. A previous application modification request to the same effect, filed February 28, 1984, was denied by the Commission on June 18, 1984. *CBS, Inc. and Dominion Video Satellite, Inc., supra.*

22. On July 12, 1984, United States Satellite Broadcasting Company (USSB) was granted authority to build and launch two satellites with each satellite transmitting six channels for half-CONUS service. USSB was

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[10] STC also indicated that it would modify its feederlink capability. No information was provided, except for a vague description of location. No action will be taken until complete information is submitted.

assigned orbital positions 101°W (for eastern service) and 148°W (for western service), and channels 2, 4, 18, 22, 26, and 30 (as requested) at each position. On July 16, 1984, USSB requested a modification in its channels assignment, requesting channels 18, 20, 22, 24, 26, and 28. On the same date, it made a separate request for the addition of two channels for each of its satellites, stating that it had been advised by its spacecraft contractor that each satellite could be "easily modified" to provide eight channels. On July 19, 1984, USSB requested that all of its channels be assigned at 110°W instead of its current 101°W assignment. USSB asserts that its request for change in orbital position is a minor modification as it requires no additional spectrum. On July 24, 1984, Syndicated opposed USSB's request for additional channels. It argued that as USSB's request requires the use of additional spectrum, it constitutes a major amendment and must be denied.

23. The requests for additional channels by Dominion and USSB cannot be granted at this time. As stated in our decision denying the previous request by Dominion, *CBS, Inc. and Dominion Video Satellite, Inc., supra,* while the rapid development of DBS technology requires flexibility in its administration, well established procedural rules will not be ignored. Granting requests such as these could, on balance, jeopardize the overall development of the service. Also, such a grant would violate the rights of other DBS permittees and applicants. *Id.* at para. 9. In this particular case, there is every likelihood that the requested channels will remain available until the time that they can be applied for by these parties within the rules.[11] This further reduces any justification for violating our rules here. Accordingly, these requests for additional channels will be denied. The requests will be assigned file numbers as new applications and will be considered after disposition of the second-round applications.

24. The request by USSB for a change in channels and orbital position can be granted at this time. The changes do not entail the use of any additional orbit spectrum resource and the channels and position are available, and no other parties have taken action which would be prejudiced by such a grant.

25. Accordingly, IT IS ORDERED, That the application of CBS, Inc., File No. DBS 81-02-MP, for modification of construction permit for an

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[11] In Dominion's case, only four channels remain available on its polarization at its orbital position of 119°W. That number of channels does not fit the current system plans of any other permittee or applicant, although those plans may be modified. In USSB's case, only four channels remain available on its polarization at one of its requested positions, 110°W. If another six-channel system joins USSB at its other position, 148°W, as seems likely, the same will be true.

Interim Direct Broadcast Satellite System IS DISMISSED, and its conditional construction permit IS CANCELED.

26. IT IS FURTHER ORDERED, That the application of Direct Broadcast Satellite Corporation, File No. DBS 81-03-MP, for modification of construction permit for an Interim Direct Broadcast Satellite System IS GRANTED, and DBSC IS AUTHORIZED to construct and launch two satellites to provide DBS service on ten channels from two orbital positions, one for eastern service and one for western service, in accordance with the specifications set out in this Order and its forthcoming authorization, and otherwise in accordance with the terms, conditions, and technical specifications set forth in its application, as amended.

27. IT IS FURTHER ORDERED, That the application of Graphic Scanning Corporation, File No. DBS 81-05-MP, for modification of construction permit for an Interim Direct Broadcast Satellite System IS DISMISSED, and its conditional construction permit IS CANCELED.

28. IT IS FURTHER ORDERED, That the application of RCA American Communications, Inc. as modified, File No. DBS 81-06-MP, IS ASSIGNED a new File Number, File No. DBS 84-06, and its conditional construction permit IS CANCELED.

29. IT IS FURTHER ORDERED, That the application of Western Union Telegraph Company, File No. DBS 81-08-MP, for modification of construction permit for an Interim Direct Broadcast Satellite System IS DISMISSED, and its conditional construction permit IS CANCELED.

30. IT IS FURTHER ORDERED, That the request for further modification of its construction permit, filed by Satellite Television Corporation on July 17, 1984, IS GRANTED AND Satellite Television Corporation IS AUTHORIZED to construct and launch two satellites to provide DBS service on channels 6, 8, 10, 12, 14, and 16 from an orbital position of 110°W, in accordance with the specifications set out in this Order and its forthcoming authorization, and otherwise in accordance with the terms, conditions, and technical specifications set forth in its application, as amended.

31. IT IS FURTHER ORDERED, That the request for further modification of its construction permit, filed by Dominion Video Satellite, Inc. on July 19, 1984, IS ASSIGNED a new File Number, File No. DBS 84-05.

32. IT IS FURTHER ORDERED, That the request for further modification of its construction permit to include two additional channels per satellite, filed by United States Satellite Broadcasting Company, Inc. on July 16, 1984 IS ASSIGNED a new File Number, File No. DBS 84-07.

33. IT IS FURTHER ORDERED, That the requests for further modification of its construction permit to change its authorized channels and one orbital position, filed by United States Satellite Broadcasting

Company, Inc. on July 16, 1984 and on July 19, 1984 ARE GRANTED, and United States Satellite Broadcasting Company, Inc. IS AUTHORIZED to construct and launch two satellites to provide DBS service on channels 18, 20, 22, 24, 26, and 28 from orbital positions 110°W and 148°W in accordance with the specifications set out in its forthcoming authorization, and otherwise in accordance with the terms, conditions, and technical specification set forth in its application, as amended.

34. IT IS FURTHER ORDERED, That the Mass Media Bureau shall send by Certified Mail, Return Receipt Requested, a copy of this *Memorandum Opinion and Order* to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Comparative Coverage Issue
Comparative Criteria
Diversification of Control

> Although a diversification preference normally prevails, where that preference is slight, the Board awards permit to competitor having moderate to substantial coverage preference. Slight integration preference is also not dispositive.
> —*Christian B/cing of Midlands, Inc.*
> BC Docket No. 81-178

FCC 84R-78

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Christian Broadcasting of the Midlands, Inc. Omaha, Nebraska	BC Docket File No. BPCT-790327LD
Pappas Telecasting Incorporated Omaha, Nebraska	BC Docket No. 81-179 File No. BPCT-791026LB
For Construction Permit for a New Television Station	

Appearances

Mark W. Amerman, on behalf of Christian Broadcasting of the Midlands, Inc.; and *John G. Johnson, Jr.* and *Peggy Kobacker Shiffrin*, on behalf of Harry J. Pappas.

DECISION

Adopted: October 29, 1984; Released: October 31, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Christian Broadcasting of the Midlands, Inc. (CBM) and Harry J. Pappas, the successor to Pappas Telecasting Incorporated[1] (Pappas) for authority to construct a new UHF television station on Channel 42 in Omaha, Nebraska. By *Hearing Designation Order* released March 23, 1981, the case was set for hearing on the standard comparative issue which was later expanded to encompass comparative coverage. *See* FCC 81M-1645, released May 28, 1981.

2. In an *Initial Decision (I.D.),* FCC 84D-23, released April 5, 1984, Administrative Law Judge John H. Conlin (ALJ) awarded the permit to Pappas because its strong coverage advantage outweighed CBM's slight diversification preference. The proceeding is now before the Review Board on exceptions filed by CBM and limited exceptions filed by Pappas. We have reviewed the *I.D.* in light of the exceptions and reply briefs, the oral argument held August 17, 1984, and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, and affirm his ultimate choice of Pappas as the superior comparative applicant. In so doing, we agree with the ALJ that the applicants are nearly equal with respect to integration of ownership and management and that the case therefore comes down to whether Pappas' coverage preference outweighs CBM's diversification edge. We concur with the ALJ that it does.

3. *Diversification of Control.* The ALJ attributed no media ownership to CBM. *I.D.*, Concls., para. 3. On the other hand, Pappas is the licensee of two UHF television stations, KMPH, operating on Channel 26 at Visalia, California, and WHNS, licensed to operate on Channel 21 at Asheville, North Carolina. *I.D.*, Fdgs., para. 6.[2] CBM argues that these facts require that the "slight" preference awarded by the ALJ to it be elevated to "moderate." We disagree that more than a slight preference may be accorded here.

4. Although CBM is correct that Pappas completely controls these stations and that the *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 395 (1965), places emphasis on the degree of ownership involved, the most important factor here is the great distance of these stations from Omaha. We have often repeated the *Policy Statement's* injunction, 1 FCC 2d at 394-5, that "interests in the principal community proposed to be served will normally be of most significance,

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[1] *See Order,* FCC 84M-007, released January 5, 1984.

[2] We agree with the ALJ (*I.D.*, n.4) that Pappas' ownership of AM Station KGEN, Tulare, California, should not be attributed to him because, when that interest was acquired from a court appointed receiver and the license assignment approved by the Commission, Pappas made a simultaneous commitment to divest the station by July 1, 1984. *See* FCC File No. BAL-820216GH: *see also Washington Christian Television Outreach, Inc., FCC 84R-70, released October 9, 1984 (Rev. BD.), at para. 35.*

followed by other interests in the remainder of the proposed service area, and, finally, generally in the United States." Here, the stations, by counsel's estimate — Reply Br. at 5; Tr. 702 — are each approximately 1500 miles away from the proposed community of license.[3] In addition, CBM concedes that there are several other media outlets present in both the Visalia and Asheville markets and that a plethora of television and other broadcast signals are received in both (Br. at 6-8), and Pappas points out that a new UHF permit has recently been issued for Asheville (Reply Br. at 4). Thus, CBM has not demonstrated that Pappas' other television stations are significant in terms of coverage or with respect to other existing media in their respective localities, which are also factors the Commission weighs in evaluating the importance of other media ownership. *See Policy Statement, supra* 1 FCC 2d at 395.

5. CBM's citation to past precedent is also unavailing. Thus, in *Angeles Broadcasting Network*, 96 FCC 2d 5 (Rev. Bd. 1984), a slight-to-moderate preference was awarded in a California case where, unlike here, the other interests were located in the nearby states of Colorado and Arizona, and in *CJL Broadcasting, Inc.*, 54 RR 2d 1037, 1041-2 (1983), a moderate preference was awarded where distant interests were weighed along with a *local* (same community) broadcast interest. No local ownership interests are present here, and thus the recent Board cases cited by CBM at page 13 of its brief are not controlling because they all involved the award of significant preferences where applicants owned local media interests.[4] *See generally WFSP, Inc.*, 56 RR 2d 1449 (Rev. Bd. 1984). Here, both of Pappas' television stations are simply too distant from Omaha to impact much, if at all, on the Commission's policy of achieving a maximum diffusion of control of the media of mass communications. Hence, CBM merits no more than a slight preference. *Compare Joseph Bahr*, 92 FCC 2d 114, 119-20 (Rev. Bd. 1982) (slight preference because of 100% ownership of station in St. Croix, Virgin Islands), *modified sub nom. Global Broadcasting Group, Inc.*, 54 RR 2d 404 (1983), *with Phoenix Media Corp.*, 56 RR 2d 1241, 1245 (Rev. Bd. 1984) (moderate preference where ownership interests were in four in-state broadcast stations); *see also Focus Television Co., A Joint Venture*, 56 RR 2d 1335, 1340 (Rev. Bd. 1984) (Commission precedent in recent years has tended to award larger preferences where interests are in local

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[3] We note in passing that the parties should place such mileage data in the record to ensure preciseness as well as to facilitate the Board's evaluation of the comparative case.

[4] An older case cited by CBM, *Snake River Valley Television, Inc.*, 26 FCC 2d 380 (Rev. Bd. 1970), where a substantial preference was awarded, is also distinguishable because there the ownership pattern included eight other stations in the same state or nearby states.

community or in same state).[5]

6. *Integration of Ownership and Management.* The ALJ concluded that there were no meaningful qualitative or quantitative differences between the applicants that would warrant award of a preference. He found that CBM proposed 100% full-time integration and Pappas proposed 99%, with each principal performing significant managerial duties. *I.D.*, Concls., para. 1. We agree that this bare 1% differential provides no clear quantitative difference and thus requires examination of any qualitative differences that exist. *See KIST, Inc.*, FCC 84R-74, released October 19, 1984 (Rev. Bd.), para. 31. Pappas offers twenty years of broadcast experience including considerable time spent in all phases of station management. He also proposes to take up residence in Omaha. *I.D.*, Fdgs., para. 16-18. Each of CBM's three directors is a long-term local resident and one of them, Theodore A. Sewell, has been an active participant in local civic organizations. *Id.*, at paras. 10, 12-14. CBM argues that it should receive a moderate preference because its local residence credit outweighs Pappas' broadcast experience advantage. Br. at 18. We conclude that CBM warrants only a minimal integration preference.

7. Although Pappas is superior on broadcast experience, CBM is equally clearly ahead on the more important factor of local residence and concomitant civic participation. The *Policy Statement, supra,* 1 FCC 2d at 396, and subsequent cases, have resolutely stated that since it "confers only an initial advantage," previous broadcast experience is of "minor significance," and thus "not so significant as local residence." *See New Continental Broadcasting Co.,* 55 RR 2d 413, 415 (Rev. Bd. 1983); *Cannon's Point Broadcasting Co.,* 93 FCC 2d 643, 653 (Rev. Bd. 1983), *recon. denied,* FCC 83R-38, released May 13, 1983. Hence, CBM is entitled to an ownership integration preference but because that preference rests

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[5] Another index of the slightness of Pappas' diversification disadvantage is the fact that although current Commission rules permit a single entity to own or control 31 broadcast stations without considering that number, *simpliciter,* to constitute an undue concentration of broadcast voices (*i.e.*, 12 AM, 12 FM, 7 TV, *see Multiple Ownership Rules,* 56 RR 2d 859, *modified,* FCC 84-400, released August 9, 1984 (TV station limit held at *status quo ante* pending reconsideration)), Pappas owns but 2 very distant stations. Clearly, if Pappas owned anything approaching the FCC's upper ownership limits, its diversification disadvantage would probably be "substantial" and essentially dispositive in its competitor's favor. If it owned stations, the number of which fell into the middle range of our ownership limits (yet not close enough to affect the number or quality of media voices in the subject community or geographic area), its diversification disadvantage would be considered, as logic would have it, "moderate." Again though, under our *Policy Statement,* numbers are not paramount, *see* 1 FCC 2d at 394-395; all relevant characteristics are considered. As our precedent teaches, we also look at such pertinent factors as the location of other interests, type of interests (*e.g.*, newspaper, cable, broadcast), degree (or percentage) of ownership interest, number of competing voices, *etc.*

solely on qualitative differences whereas the more important quantitative integration credit is in equipoise, we award only a slight overall preference to CBM. *See Radio Jonesboro, Inc.*, 55 RR 2d 991, 996 and n.7 (Rev. Bd. 1984).[6]

8. *Comparative Coverage.* Pappas' Grade A coverage area includes 214,490 more persons in a 3,298 square mile area than are covered by CBM and Pappas would also cover in its Grade B contour 226,737 more persons in a 5,596 square mile area than would CBM. Pappas' Grade B contour also totally encompasses CBM's. In addition, Pappas would provide a first Grade B service to 180 persons in a 38 square mile area, a second Grade B service to 3,774 persons in a 322 square mile area, a third Grade B service to 8,050 persons in a 348 square mile area, a fourth Grade B service to 37,418 persons in a 1,595 square mile area, and a fifth Grade B service to 138,510 persons in a 1,502 square mile area. *I.D.*, Fdgs., paras. 20-21. Based on its Grade B coverage advantages, and particularly its service to underserved areas, the ALJ awarded Pappas a "strong" coverage preference which ultimately resulted in selection of Pappas as the preferred applicant. *I.D.*, Concls., paras. 5-6. On the basis of a detailed analysis on Commission coverage precedent, CBM argues that Pappas' preference should be reduced to "moderate." Br. at 19-28. We conclude that Pappas is entitled to a moderate-to-substantial preference for coverage.

9. To begin with, the Commission and the Board have awarded "slight" coverage preferences where an applicant provided substantially greater overall coverage than its opponent even where that additional service was to areas that were well-served with five or more existing services. *See Simon Geller*, 90 FCC 2d 250, 268-9, 276 (1982), *remanded*

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[6] In reaching this conclusion, we note but need not decide Pappas' claim that CBM's quantitative integration credit should be reduced to 66⅔% because it impermissibly amended its application after the B cut-off date to substitute Monte E. Lund for Richard S. Taylor as a 33⅓% integrated principal. (Br. at 16-19.) CBM responds that Pappas' objection is grossly untimely because it was not raised at the time of CBM's proposed amendment or at any time during the hearing. (Reply Br. at 4-12.) The matter was further vented at oral argument where counsel for Pappas indicated that no objection was raised when the amendment was proposed because it believed such a substitution to be permitted by *Great River Broadcasting, Inc.*, 12 FCC 2d 35 (Rev. Bd. 1968). We also questioned counsel for CBM as to whether the Board should correct what appears in light of more recent cases to be a plain error in the application of the law regarding comparative upgrading. Tr. 677-681. *See Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140 (Rev. Bd. 1970); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 843 (Rev. Bd. 1981); and *Birmingham Family TV, Inc.*, 91 FCC 2d 348 (Rev. Bd. 1982). The questions explored at oral argument, however, have not been fully briefed by the parties and since any diminution in CBM's integration credit would not change the ultimate result under the comparative issue, we conclude that it would serve no useful purpose as the case presently stands to make a final ruling on Pappas' exception.

on other grounds sub nom. Committee for Community Access v. *Fcc*, No. 82-2314 (D.C. Cir. June 15, 1984); *Daytona Broadcasting Co., Inc.*, 55 RR 2d 1326, 1341 (Rev. Bd. 1984). Here, of the 226,737 person Grade B coverage advantage, or 24% that Pappas offers, only 38,805 currently receive five or more services. *A fortiori*, Pappas receives at least a "slight" preference on *overall* coverage advantage alone. Second, we have also awarded "slight" preferences to applicants who provide new *third* and *fourth* services to substantial populations. *See Radio Jonesboro, Inc., supra*, 55 RR 2d at 996-7. Because Pappas would provide such service to a total of 45, 468 persons, the preference he would garner for this factor alone must be added to his overall coverage advantage. Finally, the largest preferences are traditionally awarded for provision of new *first* and *second* daytime or nighttime services. *See FBC, Inc.*, 55 RR 2d 1344 (Rev. Bd. 1983); *Ram Enterprises*, 57 FCC 2d 844 (Rev. Bd. 1976), *rev. denied*, FCC 76-597, released June 24, 1976 (Comm'n). Here, Pappas will be providing service to 180 persons who have no cognizable service whatever and providing 3,774 persons with their *second* service (hence their *first competitive service* and choice of radio voices). However, we will not award Pappas the full "substantial" preference given in *Ram* and *FBC* because the first service here is to much smaller numbers than in those cases and would not be, by itself, sufficient to warrant a decisive preference. *See Colorado West Broadcasting, Inc.*, 57 FCC 2d 526 (Rev. Bd. 1976). Nonetheless, Pappas' *second* service advantage would alone earn it at least a "moderate" preference, *see Communications Properties, Inc.*, 92 FCC 2d 45 (Rev. Bd. 1982) (moderate preference for second service to 4,456 persons, but no first service), *rev. denied*, FCC 83-320, released July 7, 1983; *Town & Country Radio, Inc.*, 70 FCC 2d 572 (Rev. Bd. 1978) (moderate preference to applicant providing second service to 5,341 more persons where opponent provided first service to 40 and third service to 2,089), and it also has a small first service advantage in addition to its other coverage advantages. While CBM attempts to minimize each of Pappas' advantages, the plain fact is that CBM can claim no comparable coverage benefits itself in terms of service to underserved areas or overall coverage. Taken together, we believe that the quantitative sum of Pappas' coverage advantages requires the award of a solid preference which we will characterize as moderate-to-substantial.

10. *Comparative Summary.* CBM has been awarded slight preferences for diversification of control and integration of ownership and management, whereas Pappas has received a moderate to substantial preference for comparative coverage. Of these preferences, CBM's integration edge is the least significant and therefore cannot be decisional because it amounts to only a small qualitative difference between otherwise quantitatively equal proposals. *See Radio Jonesboro, Inc.*,

supra; Phoenix Media Corp., supra. The choice then is between CBM's diversification plus and Pappas' coverage superiority. Diversification is, as a general matter, the single most important comparative factor under the *Policy Statement, supra,* and will normally prevail over any other equal or lesser comparative preference, *see Gilbert Broadcasting Corp.,* 91 FCC 2d 450, 470 (1982), *recon. denied,* FCC 83-30, released January 25, 1983; however, this is not necessarily the case with regard to a much stronger preference in other important areas. *Cf. The O.T.R.H., Inc., The Old Time Religion Hour, Inc.,* 54 RR 2d 989 (Rev. Bd. 1983); *Cleveland Television Corp.,* 91 FCC 2d 1129 (Rev. Bd. 1982), *rev. denied,* FCC 83-235, released May 18, 1983, *aff'd sub nom. Cleveland Television Corp.* v. *FCC,* 732 F.2d 962 (D.C. Cir. 1984). Pappas' solid engineering preference is plainly the most outstanding and reliable comparative feature in this case. We have long recognized the importance of the coverage element, *see Daytona Broadcasting Co., Inc., supra,* at n.45,[7] and where, as here, CBM's diversification preference rests solely on the relatively minor impact of Pappas' distant broadcast holdings, we believe Pappas' very measurable coverage advantages must take precedence. *See FBC, Inc., supra; cf. Ram Enterprises, supra.* A grant of Pappas' application will best serve the public interest, convenience, and necessity.[8]

11. ACCORDINGLY, IT IS ORDERED, That the motions for leave to amend application, filed May 29, July 2, July 30, and August 28, 1984 by Harry J. Pappas, ARE GRANTED, and the amendments ARE ACCEPTED; and

12. IT IS FURTHER ORDERED, That the application of Harry J. Pappas, the successor to Pappas Telecasting Incorporated (File No. BPCT-791026LB) for a construction permit for a new television station at Omaha, Nebraska IS GRANTED, and the application of Christian Broadcasting of the Midlands, Inc. (File No. BPCT-790327LD) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

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[7] As was stated in *Chapman Radio and Television Co.,* 19 FCC 2d 185, 236 n. 38 (ALJ 1968), *Aff'd* 19 FCC 2d 157 (Rev. Bd. 1969), "[U]nlike the other criteria for evaluating comparative proposals, engineering coverage is the least likely to be changed. Local owners may move away or sell out to outsiders. Integrated owners may decide to entrust daily management to salaried staff. But significant technical changes cannot be made except on application to, and approval of, the Commission."

[8] Because of the result reached herein, we need not reach Pappas' exception to the ALJ's refusal to grant its November 12, 1982 Contingent Motion to Reopen the Record.

FCC 84D-23

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

Christian Broadcasting of the Midlands, Inc. Omaha, Nebraska	BC Docket No. 81-178 File No. BPCT-790327LD
Pappas Telecasting Incorporated Omaha, Nebraska	BC Docket No. 81-179 File No. BPCT-791026LB
For Construction Permit for a New Television Station	

Appearances

Joseph E. Dunne, III, *James A. Gammon* and *Mark W. Amerman*, on behalf of Christian Broadcasting of the Midlands, Inc.; and *John G. Johnson, Jr.* and *Peggy Kobacker Shiffrin*, on behalf of Pappas Telecasting Incorporated; and *Joseph Belisle* and *Y. Paulette Laden* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

Issued March 29, 1984; Released: April 5, 1984

Preliminary Statement

1. This proceeding involves the applications of Christian Broadcasting of the Midlands, Inc. (CBM) and Pappas Telecasting Incorporated (Pappas) for a construction permit for a new UHF television station to operate on Channel 42 at Omaha, Nebraska. Because the applications were mutually exclusive, the Commission, by Hearing Designation Order released March 23, 1981, designated the applications for a comparative hearing on the following issues:

> 1. To determine, on a comparative basis, which of the applications would better serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

2. Thereafter, the hearing issues were modified in two respects: (1) the comparative issue was expanded to encompass comparative coverage (FCC 81M-1645, released May 28, 1981); and (2) the following issue was added (FCC 81M-2831, released September 9, 1981):

> To determine whether Pappas Electronics, Inc., former licensee of KBOS (FM) and KGEN (AM), Tulare, California while Harry J. Pappas functioned as an officer, director and shareholder, misrepresented the communities, area and populations served by those stations, and the power of KBOS in coverage maps distributed to advertisers and the public, and, if so, the effect thereof on the comparative qualifications of Pappas Telecasting Incorporated to be a Commission licensee.

3. A prehearing conference was held on May 26, 1981 and hearings were held on August 31, 1981 and February 9, 10 and 11, 1982.[1] The record was closed by Order released April 8, 1982 (FCC 82M-1119). Proposed findings were filed on April 30, 1982 and reply findings were filed on May 21 and 24, 1982. Thereafter, CBM amended its application to state that its specified antenna site was no longer being relied on because of uncertainties surrounding its availability. This and a subsequent amendment specifying a new site gave rise to a number of pleadings and led eventually to the specifications of a site availability issue.[2] The record was reopened (October 21, 1983), but a hearing on the issue became unnecessary when a motion for summary decision was granted and the issue resolved in favor of CBM.[3] On January 5, 1984 the record was again closed.

Findings of Fact

Comparative Issue

4. The comparative issue in this case involves three elements of comparison: diversification of ownership in media of mass communications; integration of ownership with management; and comparative coverage.

5. *Diversification:* Neither CBM nor its officers or directors have any ownership interest in any authorized broadcast facility. CBM does distribute a monthly newsletter, with occasional supplements, to supporters of its ministry (Tr. 144-45). The newsletter is distributed at no cost to approximately 3,400 persons and does not carry advertising (Tr. 182-83). The newsletter has neither a name nor a regular schedule for publication (Tr. 144). Since January 1980 CBM has purchased time for a one-half hour radio program broadcast daily by an Omaha station. It is CBM's intention

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[1] In addition, further conferences were held on September 22, 1981; September 1, 1983; and November 4, 1983.

[2] *See* FCC 82M-3841, released December 3, 1982; FCC 83M-873, released March 16, 1983; FCC 83M-872, released March 16, 1983; FCC 83M-2871, released August 25, 1983; FCC 83M-3779, released October 21, 1983.

[3] FCC 84M-008, released January 5, 1984.

to discontinue the program should its application be granted (CBM Ex. 1; Tr. 250).

6. Pappas is the licensee of two UHF television broadcast stations: KMPH, operating on Channel 26 at Visalia, California and WHNS, which is licensed to operate on Channel 21 at Asheville, North Carolina (Pappas Ex. 2, p. 1).[4]

7. *Integration (CBM).* CBM is a nonprofit, nonstock Nebraska corporation, incorporated August 24, 1976. CBM is controlled by a board of directors composed of the following individuals:

Leroy G. Huelle	President, Director
Monte E. Lund	Vice President-Treasurer, Director
Theodore A. Sewell	Secretary, Director

Directors of CBM are elected by the other members of the board of directors for an indefinite term until the director dies, resigns, or is removed by a majority vote of the remaining directors (CBM Ex. 1, pp. 1-2).

8. Since the formation of CBM in 1976, seven different individuals have served as directors (Tr. 232). The three current directors, as indicated above, are Leroy G. Huelle, Monte E. Lund and Theodore A. Sewell. Mr. Huelle has been a member of the board since its inception (Tr. 222); Mr. Sewell became a member sometime between March 14, 1979 and March 26, 1979 (Tr. 140); and Mr. Lund became a director in June of 1981, replacing Mr. Richard Taylor, who had resigned (Tr. 193). Mr. Huelle is CBM's chief executive officer and is responsible for the overall operations of CBM. Mr. Lund is CBM's administrator and is responsible for the day-to-day administrative management decisions. Mr. Sewell is CBM's business manager (CBM Ex. 2, pp. 1-2).

9. All CBM directors will participate on a day-to-day basis in station management should CBM be granted a construction permit and all purpose to work full time (at least 40 hours per week) at CBM's proposed station. Mr. Huelle will be employed at the station as the full-time

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[4] On January 14, 1982 a receiver appointed by the Superior Court of the State of California for the County of Tulare to operate standard broadcast station KGEN in Tulare, California delegated certain operating functions at KGEN to Pappas Electronics, Inc. (hereinafter, Electronics) a wholly-owned subsidiary of Pappas Telecasting Incorporated pending Commission consent to the proposed assignment of KGEN's license to Electronics. (Electronics was formerly the licensee of KGEN and retained a security interest in KGEN's assets upon the Commission-authorized assignment of the KGEN license and assets to Walls & Sharp Broadcasting, Inc. in May of 1980.) Electronics has committed itself to divest the KGEN license no later than July 1, 1984 as required by Section 73.35 of the Commission's Rules and as expressly recited in the FCC Form 314 application for consent to the assignment (FCC File No. BAL-820216GH). See also FCC 83M-2872, released August 25, 1983. In the circumstances, Pappas' interest in KGEN will not be considered for diversification purposes.

program director and will direct and supervise station operations in his role as CBM's chief executive officer. Mr. Huelle will be the chief spokesman for CBM in the community and will be involved, in conjunction with the general manager, Mr. Lund, and other programming personnel in the production, selection and scheduling of CBM's programming (CBM Ex. 2, p. 1). Mr. Lund will serve full time as the station's general manager, reporting to Mr. Huelle. Under Mr. Huelle's direction, Mr. Lund will be responsible for the day-to-day operational management of the station and will have supervisory oversight over the station manager, director of stewardship, director of ministries and sales director (CBM Ex. 2, p. 1; Tr. 197, 201). Mr. Sewell will be employed at the station full time as the station's business manager. He will be responsible for managing the station's business and accounting functions, and will be supervising the director of informational services and the director of accounting (CBM Ex. 2, p. 2; Tr. 156, 197).

10. Leroy G. Huelle was born, raised and educated in Pierce, Nebraska. He subsequently attended Concordia Teachers College in Seward, Nebraska. Mr. Huelle became a resident of Omaha in 1961 when he joined Grolier, Inc., a publishing company. He became national sales manager for Grolier in 1971, supervising division managers in eight regions throughout the country. He joined the staff of Encyclopedia Britannica in 1972 and in 1973 he accepted a position as division manager which required him to move to Washington, D. C. Mr. Huelle returned to Omaha in 1974, working as a salesman for various companies. Since August 1978 he has worked full time for CBM and since January of 1980 has produced and assisted in hosting CBM's daily radio show "Count It All Joy" (CBM Ex. 3, pp. 1-3).

11. Mr. Huelle is a member of the Nebraska Broadcasters Association, the Omaha Chamber of Commerce and the Full Gospel Businessmen's Fellowship International. He is also the co-founder and chairman of Midlands Jesus Rallies, which are interdenominational religious rallies designed to spread the gospel and raise funds for various Omaha charitable organizations.

12. Monte E. Lund was born in Omaha and has lived there or in its immediate suburbs most of his life. Following a brief period as an editorial writer for KGDN and KBIQ-FM in Seattle, Washington (1974-1975), he became a pilot and on returning to Omaha in 1979 was employed as a flight instructor at an Omaha airport. Mr. Lund served as the assistant to the president of Bellevue College from May of 1980 to February 1981, when he began working full time as administrator for CBM (CBM Ex. 3, pp. 4-6).

13. Theodore A. Sewell was born in Omaha on May 3, 1931 and is a lifelong resident of the area. He attended all grade school levels in the

Omaha public school system and served in the United States Navy from which he received an honorable discharge. Mr. Sewell has spent most of his professional career in the electrical supply business. From 1953 to 1965 he was employed at Interstate Electric Supply, first as a salesman and later as a manager of that company. In 1965 he established and became part owner (20%) and president of West Dodge Electric Supply, Ltd. in Omaha. As president his responsibilities include management of West Dodge Electric, which includes approximately 58 employees in West Dodge Electric's 5 branch offices. Mr. Sewell has recently begun working part-time as CBM's business manager. In the event of a grant of CBM, Mr. Sewell will retain his ownership interest in West Dodge Electric and will continue to be involved in its management but on a much reduced level so as not to infringe on his commitment to CBM (CBM Ex. 1, p. 2; Ex. 3, pp. 7-9).

14. Other civic and church related organizations that Mr. Sewell has been involved in or is a member of include; the Omaha Chamber of Commerce, the Nebraska Inter-Industry Council, the Tangier Shrine, the Omaha Press Club, St. Paul United Methodist Church, Full Gospel Businessmen's Fellowship International and the West Omaha Rotary Club.

15. *Integration (Pappas).* Harry J. Pappas is the president, chief executive officer, director and 99% shareholder of Pappas Telecasting Incorporated. The other officers and directors of Pappas include: Stella A. Pappas, Robert E. Denton, LeBon G. Abercrombie and Joseph A. Shaffer (Pappas Ex. 2, p. 1). The shareholders of Pappas are Harry J. Pappas who owns 99% of the issued and outstanding common voting stock and LeBon G. Abercrombie.[5]

16. If Pappas is awarded a construction permit in this proceeding, Mr. Pappas will sell his present home in Visalia, California and will take up residence in Omaha. Since September of 1978 Mr. Pappas has visited Omaha between eight and ten times and has selected a neighborhood in which he hopes to purchase a home (Tr. 76-77,83). Mr. Pappas will serve as general manager of the new station on a full-time basis (at least 40 hours a week) (Pappas Ex. 2, p. 12; Tr. 60). As general manager he will be responsible for overseeing all aspects of the construction and operation of the new station and he will have ultimate responsibility for determining the station's policies and practices, including employment, programming, acquisition and use of equipment, sales and community involvement (Pappas Ex. 2, p. 12).

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[5] By amendment dated November 11, 1981, accepted in the presiding officer's Order, FCC 82M-0233 (released January 25, 1982), Pappas reported the issuance of 1% of Pappas' voting stock to LeBon Abercrombie. Official notice taken.

17. Mr. Pappas has spent his adult life in broadcasting. In 1963, at the age of 17, he became a part-time announcer and part-time salesman at standard broadcast station KVEG in Las Vegas, Nevada (Pappas Ex. 2, p. 13; Tr. 84). In 1964 Mr. Pappas' older brother, Mike Pappas, formed Pappas Electronics, Inc. in order to purchase KGEN a bankrupt standard broadcast station in Tulare, California (Tr. 437). Harry Pappas owned 10% of the stock of Electronic with his older brothers Mike and Pete owning the remaining 90% (Tr. 568).

18. For the first year or so thereafter Harry Pappas worked as a weekend announcer at KGEN. He also was involved in part-time sales service work, i.e., in setting up advertising schedules and getting copy information from existing advertising customers of the station (Tr. 571, 574-75). In addition he assisted in the remodeling of the station and performed general maintenance under the direction of his brother Mike (Tr. 444, 571-72). He was later involved (with his brothers) in the establishment and operation of KGEN-FM, Tulare, California; KMPH-TV, Visalia, California; and KTRB (AM and FM), Modesto, California. In the early 1970s he became general manager of KMPH-TV and served in that capacity through most of the decade. During this period he was involved in all aspects of station management: audience research, program acquisition and production, news and public service programs, satellite interconnection, employment resources, equipment purchasing, station promotion, sales techniques, and identification with and involvement in the community. Pappas sold his interest in the Tulare and Modesto stations in 1978 and in the same year became (through Pappas Telecasting Incorporated) the sole owner of KMPH-TV (Pappas Ex. 2, pp. 13-15).

19. Pappas has been active in civic affairs in the Visalia area and in the spring of 1979 he became a member of a fraternal organization in Omaha known as "Aksarben." This association raises money through a number of civic and social events (such as balls, ice shows, rodeos and horse races) and donates part of the revenues raised to various charitable causes.

20. *Comparative Coverage.* A comparison of the areas and populations proposed to be served by Pappas' and CBM's proposals reveals the following differences:

Grade A	*Population*	*Area (sq. mi.)*
Pappas	841,719	6,832
CBM	627,229	3,534
Difference	214,490	3,298
Pappas Advantage	+ 34%	+ 93%

Grade B	*Population*	*Area (sq. mi.)*
Pappas	945,764	11,516
CBM	719,009	5,920
Difference	226,737	5,596
Pappas Advantage	+ 32%	+ 95%

21. Other television services within the Grade B differential areas are as follows:[6]

	Pappas Population	*Area (sq. mi.)*
None	180	38
One	3,774	322
Two	8,050	348
Three	37,418	1,595
Four	138,510	1,502
Five or More	38,805	1,791
Total	226,737	5,596

(Pappas Ex. 1, pp. A-4, A-6).

Rate Card Issue

22. This issue concerns coverage maps and promotional material contained in Rate Cards 1-8 (Pappas Exs. 6-13) which were issued and distributed by Pappas Electronics, Inc. (Electronics) licensee of KGEN-AM and KBOS-FM, Tulare, California from 1964-1980. The rate cards were distributed by Electronics from 1964 to 1978. Considerable evidence relating to engineering and to sales practices at the stations was received. However, this material would be relevant to the qualifications of Harry Pappas only if he were involved in sales and promotional activities and/or had knowledge of any inaccuracies or reason to believe they existed. These findings therefore focus on this aspect of the issue.

23. Harry J. Pappas was employed by Electronics from 1964 to 1970 and was a shareholder, secretary/treasurer and a director from 1964 to 1978 (Tr. 568). His ownership interest never exceeded 10%, the remaining stock being held by his older brothers Mike and Pete Pappas. The former was president and chief executive officer; the latter was vice president and general manager. When Harry Pappas became associated with the station he was 18 years old, his brothers (twins) were 28 (Tr. 441). Mike Pappas, by then an experienced broadcaster, was without question the chief decision maker at the Tulare stations. He had overall responsibility for sales, for dealing with lawyers, engineers and accountants, for station promotions and for programming and format decisions (Tr. 441-43). All correspondence with Standard Rate and Data Service, Inc., the publisher of a compilation of broadcast station advertising rates and facilities information, was conducted by Mike Pappas[7] (Pappas Ex. 14; Tr. 485-86). Harry Pappas had neither responsibility for, nor involvement in, any of these matters (Tr. 443).

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[6] The Pappas Grade B contour totally encompasses CBM's. Thus while Pappas serves a large area not served by CBM, the latter serves an area not served by Pappas.

[7] Mike Pappas testified that he had "dictatorial powers," that his brother Pete "agreed to that"; and that "of course, Harry Pappas had no choice. He was a young man at the time so he followed instructions" (Tr. 442).

24. As noted, *supra*, when Electronics was formed and acquired KGEN, Harry Pappas was 18 years old. He was made secretary-treasurer and a director so that he could sit in on monthly board meetings and become familiar with the operation of a radio station. "Harry at that time didn't have much of a voice. He just listened" (Tr. 444). Mike Pappas trained his younger brother in part by assigning projects to him, such as the researching of television and cable television and the 1967 relocation of the KGEN-FM (KBOS) transmitter site[8] (Tr. 444, 487-88, 628-29). However, Mike Pappas never gave Harry, as part of his training, any responsibility for the preparation of sales or promotional material (Tr. 629-30). Harry Pappas generally did not participate in the meetings of his older brothers concerning promotional campaigns or sales techniques (Tr. 578), and Harry Pappas never had occasion to suggest to Mike Pappas that certain information should or should not have been included in a rate card (Tr. 584).

25. Harry Pappas played no role in the preparation of any of the rate cards that were used by Electronics during the years when he was an officer, director and shareholder of Electronics (Tr. 526, 582, 586-87). His only participation of any kind in the preparation of the rate cards was his removal from the station's files of the 34 dBu contour map included in the KBOS site relocation application for the purpose of supplying it to the Cliff Davis Advertising Agency for preparation of Electronics' Rate Card Number 3. This he did at the specific request of his older brother Mike Pappas (Tr. 585-86). Harry Pappas' limited sales experience at the Tulare radio stations involved primarily the servicing of existing advertising accounts. This did not involve actual selling of advertising time since the customers he dealt with primarily had already signed advertising contracts with Electronics (Tr. 574-75). By 1970 Harry Pappas was no longer active in the affairs of the Tulare stations, devoting his energies instead to the establishment and operation of KMPH-TV in Visalia.

26. In view of the foregoing the presiding officer finds that inaccuracies, if any, in the KGEN and KBOS rate cards are of no significance in this proceeding, since any culpable misconduct could hardly be imputed to Harry Pappas in view of his lack of involvement in the preparation or use of the cards. For this reason no findings are necessary respecting the rate cards themselves, the purpose for which the presiding officer added the issue having already been met.

Conclusions

Comparative Issue

1. There are virtually no meaningful qualitative or quantitative differences between the applicants in terms of integration of ownership

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[8] Other duties during this period are described in para. 18, *supra*.

and management. CBM proposes 100% full-time integration and Pappas proposes 99%, with each principal performing significant managerial functions. CBM questions Mr. Pappas' long-term commitment to the station (CBM Proposed Findings, pp. 72-73), but its arguments rest on speculation and unwarranted inferences from the testimony. There is no evidence that his commitment is for the "early years of operation" only as CBM argues. Similarly, Pappas' contentions regarding the lack of permanence in CBM's operation structure and the press of other duties on its board members (Pappas Proposed Findings, pp. 40-45) are not persuasive. There is little evidence that Messrs. Huelle, Sewell or Lund will be unable or unwilling to perform their proposed functions.

2. As to the qualitative elements considered under the integration criterion, Pappas is strongly preferred on the basis of broadcast experience, having been employed in the field for two decades and having been the general manager of an independent UHF station for more than ten years. Little broadcast experience is evident and none is claimed for CBM's principals. They, however, are long-time local residents and one of them (Sewell) has been involved in a number of local civic activities. CBM's preference for local residence is mitigated somewhat by Pappas' intent to move to Omaha in the event of a grant, but, together with CBM's modest preference for civic participation, it is sufficient to offset the considerable advantage accruing to Pappas for his extensive broadcast experience. Ultimately, then, there is no real basis for choosing one applicant over the other, either qualitatively or quantitatively, under the integration criterion.

3. Turning to diversification, the presiding officer attributes no media ownership to CBM. Pappas contends that significance should be attached to CBM's monthly newsletter, its weekly half hour program aired by an Omaha radio station and Huelle's participation in organizing Midlands Jesus Rallies. The newsletter is plainly of no significance since it is not distributed to the general public; the radio program, even if relevant to diversification, will be discontinued should CBM acquire a grant and commence broadcasting; and participation in the holding of religious rallies hardly constitutes ownership in a medium of mass communications.

4. Pappas has ties to two UHF television stations, being the licensee of KMPH, Visalia, California and KHNS, Asheville, North Carolina.[9] In the circumstances, CBM is entitled to a preference; but in view of the great distance of the Pappas stations from Omaha and the number of television stations located in the Omaha area (three VHF and three UHF), the preference is slight. *Policy Statement on Comparative Broadcast Hearings* 1 FCC 2d 393, 394-95 (1965); *Minneapolis Star and Tribune Co.*, 88 FCC 2d 1604, 1609 (Rev. Bd. 1982) (distant media interest do not

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[9] At the time of the hearing, KHNS was not an operating facility.

affect the slight diversification preference already given to competing applicant).

5. In terms of comparative coverage, Pappas is clearly superior. Its Grade B contour completely encompasses CBM's and its signal would serve nearly 270,000 more people (a difference of 32%) and 5,600 (or 95%) more square miles. More importantly, an examination of other television services presently available in the Grade B differential area shows that the Pappas proposal would bring a third Grade B service to 8,050 people in a 348 square mile area, a second Grade B service to 3,774 people in a 322 square mile area, and a first Grade B service to 180 people in a 38 square mile area.[10] By contrast, there is no area at all in which the CBM proposal would bring a new service but Pappas would not (Pappas Ex. 1, p. A-6). In the circumstances, Pappas is entitled to a strong preference for its coverage proposals, with particular significance being attached to the service it would provide to underserved areas.

6. In sum, Pappas has a strong preference under the comparative coverage criterion, CBM a slight preference for diversification, and the applicants are rated equal on integration of ownership and management. In numerous cases analogous to this one, it has been held that superior coverage, when it results in new service to relatively underserved areas, furthers the major statutory objective of providing fair, equitable and efficient broadcast service, and provides a more enduring basis than other comparative factors for selecting among basically qualified applicants. *See FBC, Inc.*, 95 FCC 2d 256 (FCC 83R-75, released October 6, 1983); *Golden State Broadcasting Corp.*, 94 FCC 2d 212 (Rev. Bd. 1983); *Minneapolis Star and Tribune Co., supra*; *RAM Enterprises*, 57 FCC 2d 844 (Rev. Bd. 1976). Accordingly, the presiding officer concludes that the strength of Pappas' coverage preference and the significance generally accorded to bringing service to underserved areas must result in the selection of Pappas as the better qualified applicant.

The Rate Card Issue

7. In instances where a comparative demerit has been imposed for misrepresentations on rate cards or other promotional materials attributable to a principal of an applicant, there has been a finding that the principal was directly involved in or responsible for the misrepresentation. *See Gainesville Media, Inc.*, 70 FCC 2d 143 (Rev. Bd. 1978) (principal of applicant was general manager of station and had personally prepared misleading rate card); *Town & Country Radio, Inc.*, 65 FCC 2d 694 (Rev. Bd. 1977); *Bie Broadcasting*, 81 FCC 2d 1 (Rev. Bd. 1980) (principal of applicant was general manager of station distributing misleading promotional materials).

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[10] In addition, Pappas would provide a fourth service to nearly 37,500 persons.

8. In none of these cases has a comparative demerit been imposed for as tenuous a connection between an applicant and an instance of alleged rate card misrepresentation as the connection between Pappas and the distribution of the rate cards in question here. The record shows that Harry Pappas was in no way responsible for, nor did he participate in, the preparation and distribution of the KGEN and KBOS rate cards. At the time Pappas Electronics acquired KGEN, Harry Pappas was 18 years old. Though nominally a principal of the licensee, he was given no significant responsibility at the station at all, but merely followed the orders of his older brother Mike Pappas who was the chief executive officer of Pappas Electronics and the primary decision maker at the stations.

9. The record shows that it was Mike Pappas who handled the preparation of the rate cards and all other promotional matters for the stations. Since Mike Pappas and Pete Pappas handled most of the initial sales for the stations, with Harry Pappas' sales experience being limited primarily to serving existing accounts, Harry Pappas rarely even had occasion to make use of the rate cards and, as far as the record shows, had no basis for questioning their content.

10. In sum, Harry Pappas' actual role at the station was that of an apprentice, gaining experience under the tutelage of his older brothers. He left the station in 1970 and became the general manager and later the licensee of KMPH-TV, Visalia, California. He is, for practical purposes, the sole principal of the applicant here, Pappas Telecasting Incorporated. Even if the promotional material used at KGEN and KBOS were not in full compliance with Commission policies, the nature and circumstances of his association with the stations were such that even a minor comparative demerit would be unwarranted.

11. Pappas has been preferred under the comparative issue and no negative findings or conclusions have been made under the rate card issue. Therefore it is concluded that the public interest would be better served by a grant to the Pappas application.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Christian Broadcasting of the Midlands, Inc. IS DENIED and the application of Pappas Telecasting Incorporated IS GRANTED.[11]

FEDERAL COMMUNICATIONS COMMISSION
JOHN H. CONLIN, *Administrative Law Judge*

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[11] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Remand
Site

Where winning applicant in comparative proceeding lost transmitter site, and the case was held in abeyance pending a new site, Review Board remands proceeding to determine whether applicant has demonstrated due diligence in its efforts to locate a new site. —*Grand Radio, Inc.*
BC Docket No. 80-717

FCC 84R-75

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

Grand Radio, Inc. Fraser, Colorado	BC Docket No. 80-717 File No. BP-21, 129
Jefferson Wireless Company Golden, Colorado	BC Docket No. 80-718 File No. BP-781205AH
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: October 19, 1984; Released: October 26, 1984

BY THE REVIEW BOARD:

1. On February 16, 1984, the Board declined to order a remand hearing on a new site availability issue sought by Grand Radio against Jefferson Wireless but did direct Jefferson to file status reports with the Board concerning its efforts to obtain a new transmitter site. *See Allen K. Levin*, 55 RR 2d 680 (Rev. Bd. 1984). Our review of Jefferson's status reports establishes that the record now presents new substantial and material questions of fact which must be remanded to the presiding Administrative Law Judge for further action. *See Mid-Ohio Communications, Inc.*, 56 RR 2d 238 (Rev. Bd. 1984).

2. *Background:* The Board in its February 16 order found that Jefferson's transmitter site had become unavailable after the hearing in this case. Based on Jefferson's representation that it was acting to secure a site the Board refused to remand the case for a further hearing. Instead Jefferson was directed to file periodic reports, and "if it appears that Jefferson lacks diligence in its efforts to obtain a transmitter site, we will specify an appropriate issue and remand this case for further hearing." 55 RR 2d at 682.

3. Jefferson's first status report on March 5, 1984, indicated that Mrs. Broughall, one of its principals, had retained a realtor "versed in commercial properties. Unfortunately we have had more snow the past three weeks which has severely hampered scouting sites and completely canceled any engineering attempts." On April 5 Jefferson reported it was "in the late stages of negotiations on a tract of land for the transmitter . . . " but on May 11 it reported that the property previously referred to "has been taken by another party so we are looking elsewhere for a suitable piece of land."

On June 8, 1984, the competing applicant, Grand Radio, filed a motion to dismiss Jefferson's application because it had failed to exercise reasonable diligence in its efforts to obtain a new transmitter site. Jefferson in an opposition filed July 2, 1984, stated that "[a]s of this date, Jefferson has leased a new transmitter site at an address of 5130 Parfet, Golden, Colorado. . . [and that] [n]ow that a new site has been secured, Jefferson will begin preparation of an engineering amendment for filing with the Commission."

5. Its next status report dated August 10 indicated only that a consulting engineering firm had been retained for the purpose of preparing a site change application. Finally, its latest "Further Status Report" dated October 2, 1984, contains Jefferson's consulting engineer's report which concluded that because of "numerous . . . cumulative adverse factors the Parfet Street site should not be considered as a potential transmitter site." The engineer's report suggested several potential sites which would be suitable for use *if* available.

6. *Discussion.* Eight months ago the Board afforded Jefferson an opportunity to secure a new transmitter site. We did so because Jefferson had lost its site through no fault of its own. See para. 7 of *KIST Corp.*, FCC 84R-74 released October 19, 1984. Although Jefferson had an option on the site, the landlord had succumbed to the temptations of the marketplace and made a better deal. Traditionally, the Commission has not required an option or a lease of the transmitter site, only reasonable assurance that the site will be available in the event the applicant receives a grant.

7. New snows now cover Colorado, and Jefferson's latest report from its consulting engineer, filed October 2, 1984, indicates that even if the new transmitter site at 5130 Parfet Street (Road) is in fact available, it is not suitable for use because of several features specified by the engineer. Thus, eight months after the Board's action Jefferson may now have another site, but for engineering reasons, that site is not suitable for use. While the consulting engineer identified several other sites which may be suitable for use, Jefferson must still ascertain whether it has any reasonable assurances that those sites are available.

8. Based on the sketchy reports which have been filed by Jefferson we are unable to decide whether Jefferson has been diligent in its efforts to secure a new site. On June 8 the competing applicant, Grand, filed a premature motion to dismiss alleging lack of diligence by Jefferson. In his opposition, counsel for Jefferson responded that he "can recall an instance some ten years ago where a station owner of a four tower directional AM system wore out a set of auto tires and spent eighteen months looking for a new transmitter site . . . " On September 7 Jefferson countered with an even more premature motion to finalize grant to Jefferson Wireless Company. To add to the symmetry, neither applicant cited any Commission authority justifying its respective motion.

9. The record now before us raises a substantial and material question of fact as to whether Jefferson has reasonable assurance that a suitable transmitter site is available. But, even more basic, although there is some dispute as to when Jefferson actually learned that its site was no longer available, Motion to Dismiss, note 3, the Board's previous Order establishes that it was at least "in the early summer of 1983." 55 RR 682 at para. 3. On this record Jefferson must therefore establish that since that time it has been diligent in its efforts to secure a new site. If it is unable to demonstrate diligence and good cause under well established Commission precedent, it will not be permitted to amend its application to specify a new transmitter site and its application will be denied. *See Washington's Christian Television Outreach, Inc.*, FCC 84R-70, released October 9, 1984 and authorities discussed in para. 14.[1]

10. ACCORDINGLY, IT IS ORDERED, That the issues in this proceeding are enlarged:

> To determine whether Jefferson Wireless Company has exercised due diligence in its efforts to locate a new transmitter site since learning in the summer of 1983 that its proposed site might not be available and whether it can demonstrate good cause for an amendment in the event it obtains a new available and suitable transmitter site.

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[1] After this order was drafted on October 17, 1984 Grand filed comments in which it renewed its motion to dismiss. We have dismissed that motion; however, our remand order leaves the ALJ free to utilize any procedural devices which he deems appropriate to help expedite resolution of this much delayed proceeding.

11. IT IS FURTHER ORDERED, That the Motion to Dismiss, filed by Grand Radio, Inc. on June 8, 1984, and the Motion to Finalize Grant to Jefferson Wireless Company, filed September 7, 1984, ARE DISMISSED as moot;

12. IT IS FURTHER ORDERED, That the case IS REMANDED to the presiding Administrative Law Judge for any further action he deems appropriate to resolve the new issue raised by this order.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

Affidavit Improperly Made
AM-FM Duplication
Broadcast Record, Past
Candor
Coverage, Issue
Diversification, of Control of Mass Media

In hearing matter of mutually exclusive CP application for FM station, Review Board affirmed ALJ's grant.

Applicant's substantial preference under diversification criterion, even when diminished by demerits for inaccurate affidavits outweighed preferences given competitor.
—*Hampshire County B/cing Co., Inc.*
BC Docket No. 81-159

FCC 84R-92

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Hampshire County Broadcasting Co., Inc. Amherst, Massachusetts	BC Docket No. 81-159 File No. BPH-9176
Amherst Broadcasting, Inc. Amherst, Massachusetts	BC Docket No. 81-160 File No. BPH-9566
For a Construction Permit for a New FM Station	

Appearances

Frank J. Martin, Jr. on behalf of Hampshire County Broadcasting Co., Inc.; *Jerome S. Boros,* on behalf of Amherst Broadcasting, Inc.

DECISION

Adopted: November 30, 1984; Released: December 14, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL

BOARD CHAIRMAN MARINO:

1. The two competing applicants for a new FM broadcast station in Amherst, Massachusetts have been locked in litigation since 1974 when this local FM channel was assigned to that community following a rulemaking proceeding. On April 11, 1984, Chief Administrative Law Judge Fitzpatrick released a 67 page Initial Decision, FCC 84D-24, which found both applicants basically qualified after resolving all of the specific issues which had been designated for hearing, *I.D.* Finds. 2-9, Conc. 32. Hampshire County was found to be the superior comparative applicant over Amherst Broadcasting, Inc., which already owns another broadcast station in the community of license. *I.D.* Conc. 40. Both applicants have filed verbose exceptions; the main point advanced by Amherst, the unsuccessful applicant, is that from the rulemaking proceeding in 1973 through the hearing in this case Hampshire has been engaged in a "never ending series of deception" and should therefore be disqualified for its complete lack of candor. Tr. 3434, 3437, 3483, 3489. Our review of the record, which has been facilitated by the ALJ's thorough findings, has convinced the Board that Amherst's arguments are not only procedurally but substantively flawed. We therefore affirm the grant to Hampshire, the superior comparative applicant.

2. *Background:* A decade ago this Class A FM Channel was assigned to Amherst in a rulemaking proceeding at the request of Hampshire County Broadcasting, *I.D.* Find. 9. Since 1965 the other applicant, Amherst Broadcasting, has operated the only commercial radio station in Amherst. At the pre-designation stage of the case which began in 1974, and at the hearing phase which began in 1981, the two applicants raised numerous basic qualifications issues in an attempt to disqualify each other. An applicant must be found basically qualified, *Guinan Realty Co.* v. *FCC*, 297 F.2d 782 (D.C. Cir. 1961), before it is entitled to comparative consideration. *I.D.*, Conc. 1.

3. The Initial Decision contains detailed findings and conclusions on all the qualifications issues which were specified for hearing against Amherst, *I.D.* Conc. 3-8 and Hampshire, Conc. 9-31. Both applicants were found basically qualified, *I.D.* Conc. 32, but Hampshire was assessed two slight demerits for submitting inaccurate affidavits prepared by a principal who was not in the best position to accurately report all the facts concerning the loss of Hampshire's corporate charter and completeness of its public file. *I.D.* Conc. 25, 31. These demerits were weighed by the ALJ together with the other comparative preferences in selecting the best comparative applicant. *I.D.*, Conc. 32-40.

4. First, the ALJ noted that diversification of mass media of communications is a comparative factor of "primary significance", *I.D.* Conc. 33.

Because Amherst is already the licensee of the only commercial broadcast station in the community of license, Hampshire was found to be significantly superior on this point. The Commission has consistently considered ownership "most significant when located in the principal community proposed to be served," the ALJ found, followed in decreasing importance by communications interests "in the remainder of the service area and then by those throughout the United States." *I.D.* Conc. 33-34. A 50% owner of Hampshire does have controlling interest in two stations in Massachusetts, and two in Connecticut and smaller broadcast interests in the same area. *I.D.,* Conc. 34 and Note 110. But these stations are all outside the service area of the proposed stations: "Therefore, a *substantial* preference [was] awarded Hampshire relative to the diversification factor" by the ALJ who relied upon *Multiplex Communications, Inc.* 95 FCC 2d 406, 54 RR 2d 733, 734 (Rev. Bd. 1983), and Golden State Broadcasting Corp., 94 FCC 2d 212 (Rev. Bd. 1983). *I.D.,* Conc. 34.

5. Hampshire also received a slight preference for its proposal to install an emergency generator, and a very slight preference for better comparative coverage. *I.D.,* Conc. 37-38.

6. On the other hand, Amherst did receive a *moderate* preference because 50% of its owners would participate full time in the management of the proposed station, whereas only 25% of Hampshire's owners would participate full time. *I.D.,* 36. But Amherst proposes to duplicate its existing station's programming on its proposed FM station 66.66% of the time, and the ALJ found an absence of "countervailing benefits derived from such duplication as to offset the inefficiency involved." *I.D.,* Concl. 39. Based upon the Commission's decisions in *CJL Broadcasting, Inc.,* 54 RR 2d 1937 (1983) and *Radio Station WABZ, Inc.,* 90 FCC 2d 818 (1982), the ALJ assessed Amherst a *moderate* demerit for proposing to duplicate programming. *I.D.* Conc. 39.

7. Balancing all these comparative factors, the ALJ first considered the slight demerits which he had assessed Hampshire for the inaccurate affidavits about the corporate dissolution and the incomplete public documents file, then he found that Hampshire's substantial superiority on the diversification factor, a paramount comparative consideration, together with its superiority for comparative coverage, more efficient utilization of radio facilities, and auxiliary power outweighed Amherst's only preference for superior integration proposal. Thus, Hampshire was selected as the best comparative applicant. *I.D.,* Conc. 40.

Discussion

8. *Basic Issues:* At oral argument and in its written exceptions, Amherst urged that Hampshire should have been disqualified by the ALJ because of its general lack of candor throughout the proceeding. A specific issue concerning this broad charge was never designated for

hearing. Although the ALJ did assess two slight demerits for reporting failure pursuant to two specific issues designated for hearing, he apparently did not perceive the clear lack of candor, which Amherst claimed has pervaded this hearing from beginning to the end. We have recently held in *Valley FM Radio*, FCC 84R-86, adopted December 4, 1984, that "truth and candor are always at issue in Commission proceedings, subjecting applicants to disqualification for lack of candor occurring before the eyes of the ALJ, [but] the imposition of this severe sanction should involve lack of candor that is of 'such a blatant and unacceptable dimension that its existence cannot be denied.' *Adell Broadcasting Corp.*, FCC 84R-76, __ RR __ (Rev. Bd. 1984) quoting *RKO, Inc.*, 670 F.2d at 235 (D.C. Cir. 1981)."

9. In the *Adell* case, *supra*, at para. 12, the Board agreed with the ALJ who had observed that it is "a rare case in which witness testimony cannot be subjected to attack (however frivolous in fact) at the conclusion of the case on grounds that the witness lied or was less than forthcoming in his testimony." That is exactly what has occurred in our case. In essence, Amherst, which was unsuccessful before the ALJ, in its exceptions (Br. 3-27), invites the Board to substitute Amherst's proposed findings for those of the ALJ on the corporate dissolution and public file issues and to expand the ALJ's demerits into a general finding that Hampshire "lacks character and candor." However, we have previously recognized that "[t]he Commission generally is reluctant to overturn the credibility determination of an ALJ unless his findings are patently in conflict with the record evidence . . . because the trier of fact has enjoyed a superior opportunity to evaluate the witnesses' demeanor and judge his credibility, and his determination is entitled to significant weight." *Country Broadcasting Co.*, 93 FCC 2d 83, 88 (Rev. Bd. 1983), multiple citations omitted.

10. Amherst's first major point is that one of Hampshire's principals, Perry, who had actual knowledge of the facts concerning the corporate dissolution acknowledged that he knew that a statement in another principal's affidavit was "false," but failed to correct that statement before it was filed with the Commission. (Br. 7-8). The record supports the ALJ's finding that because of the surrounding circumstances Perry had not reviewed the affidavit "with due care." *Id.* Find. 101-103, Tr. 1851-1853. Thus, there was no "conscious effort of secreting" the facts regarding the dissolution issue, but only "inaccurate" reporting for which a slight demerit was assessed. *Id.* Conc. 25. A second exception by Amherst, Br. 25-27, is to the ALJ's "overlooking of the demerit assessable" for Hampshire's carelessness in maintaining its public file, and submission of an affidavit concerning the completeness of that file. The Initial Decision contains substantial and detailed findings concerning

these matters, *Id.* Finds. 172-207. In his conclusions the ALJ focused on *both* the maintenance of the public file itself, and the affidavit about the file before assessing a second slight demerit. *Id.* Conc. 29-31, which was later weighed in the ultimate evaluation of the two applicants. *Id.* Conc. 40. We decline to substitute Amherst's inflated rhetoric for the thorough findings and conclusions in the Initial Decision.

11. Here Amherst has failed to demonstrate that the ALJ's findings are "patently in conflict with the record evidence." Its attempt to expand the slight demerits into a general disqualification is another example of a "traditional adversarial attempt to puff those matters into deliberate attempts to deceive." *Kaye-Smith Enterprises,* 56 RR 2d 252, 257 (Rev. Bd. 1984), and *Baker Protective Services, Inc.,* 55 RR 2d 1584 (Rev. Bd. 1984). We therefore affirm the ALJ's conclusion that both applicants are basically qualified to be compared, *See Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965), and turn to the comparative aspect of the case which is decisional.

12. *Comparative Issues: Diversification.* Amherst has filed exceptions to the ALJ's diversification analysis. Br. 42-45. Relying on the recent decisions in *Multiplex, supra,* and *Golden State, supra.,* the ALJ gave Hampshire a *substantial* preference on the crucial diversification factor. It was based on the finding that Amherst Broadcasting already operates one station in the community of license while the broadcast interests attributable to Hampshire were outside the service area, and two of the interests were in a different state. Thus, there was no showing of a regional concentration of control which would increase the weight to be accorded to those non-local interests. See *Multiplex, supra,* 95 FCC at 408, where the Board recognized that "a substantial concentration of control of the media on a regional scale" might diminish the substantial diversification preference usually awarded where a local monopoly would be created by licensing the same person to operate both the AM and the FM stations in the community. Here Hampshire's diversification preference was reinforced because Amherst proposes to duplicate the programming of its existing station more than 60% of the time on its proposed FM station. In accordance with the Commission's decision in *CJL Broadcasting, supra,* and *Radio Station WABZ, supra,* the ALJ assessed a *moderate* demerit against Amherst.

13. In its brief Amherst does not even attempt to distinguish the four recent cases on which the ALJ relied in making his analysis. Instead, it cites a 15 year old case, *Bill Garrett Broadcasting Corp.,* 16 FCC 2d 415 (1969), which is factually distinguishable from the present situation. There it had been established that the applicant with the multiple broadcast interests already had "newspaper and broadcast interests in five different cities and [was] seeking to hold facilities in other cities in [the] region." He

had applied for both an AM and an FM station in the community of license, and already owned four AM and three FM stations in the Georgia-Alabama area. 16 FCC 2d at 421. No such showing was made in our case. Moreover, *Garrett* was decided at a time when the Commission was tolerating AM-FM station combinations to foster the expansion of "infant" FM stations.[1] Today, the Commission is penalizing comparative applicants who propose AM-FM program duplication as the Commission cases cited above indicate. *See e.g., Radio Station WBAZ, Inc., supra,* 90 FCC 2d at 835-836.

14. *Integration and Past Broadcast Record:* Amherst argues that Hampshire should not have received credit for its 25% owner who proposes to participate full time in the management of the station because by the relevant cut-off date it had not proposed to integrate any of its present stockholders "into specified management positions" (BR. 40) But the record reflects, as the ALJ found, *I.D.* Find 37-38, that the 25% owner was first proposed as an integrated principal in 1979, several years before the case was designated for hearing. At the time the application was amended to indicate that he would "work at the station full-time" although the amendment did not specifically identify his position. *I.D.,* Find. 37-38. We have previously held that the application form does not call for an applicant's specific integration proposal, nor is an applicant required to set forth the "specified management positions." *See WHW Enterprises, Inc.,* 89 FCC 2d 799, 51 RR 2d 409, 421 (Rev. Bd. 1982); *Metro Broadcasting Inc.,* FCC 84R-85, released December 3, 1984, note 8(c).

15. Amherst excepts to the ALJ's rejection of its threshold showing of an allegedly unusually good past broadcast record. Br. 34-39. Amherst was found to have devoted "more than 25% of its time to news, public affairs, and other nonentertainment programs since 1965." However, the ALJ also found that the Commission's threshold requirement had not been satisfied because (1) Amherst had failed to demonstrate unusual attention to the public's needs and interests nor established special sensitivity to the area's changing needs; (2) "Amherst has totally failed to show that the ascertained needs and problems of Amherst and its surrounding area were specifically addressed by specific programs," and (3) Amherst failed to establish that the two other communities with which Amherst was comparing its programming "are similar demographically to Amherst." FCC 81M-3397, released October 28, 1981, paras 4 and 6. In its brief Amherst fails to show that the ALJ's ruling factually or legally departs from controlling Commission precedent. In fact, Amherst does

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[1] *Shepard's U.S. Administrative Citations* reveals that *Garret, supra,* was followed in *WLCY, Inc.,* 17 FCC 2d 338 (Rev. Bd. 1969), and has subsequently been distinguished in some 17 subsequent cases including *Radio Station WBAZ, supra,* 90 FCC 2d at 829-830.

not even rely on controlling Commission precedent. *See e.g. Gilbert Group, Inc.*, 49 RR 2d 1081, and cases cited at 1082(1981). But even if we assume arguendo that Amherst was entitled to a substantial preference for *both* integration and for past broadcast record, the Commission has held that "substantial preferences for past broadcast record and integration" are not sufficient when combined to overcome a substantial diversification preference awarded to an applicant who would bring a new voice to the community of Fargo. *See Communication Property, Inc.*, FCC 83-320, note 1, July 7, 1983, affirming 92 FCC 2d 45, 47 (Rev. Bd. 1982). Fargo already had six AM and FM stations and four television stations.

16. *Comparative Coverage.* Hampshire will serve more than twice the area and approximately three times the population proposed to be served by Amherst. But in awarding only a "very slight" preference for this superior coverage the ALJ took into account the fact that all of the area already receives a minimum of five other broadcast signals and that a small part of the city of Amherst (1.9% of the population) does not receive an adequate signal from Hampshire *I.D.*, Conc. 38. Amherst focuses only upon the limitations set out above, and ignoring the finding of superior coverage, argues that the ALJ erred on this point. Even if we were to grant this exception, it is apparent by now, if it was not clear before, that this minor matter is not of decisional significance.

17. *New Issues:* While the case was pending on exceptions Amherst filed two petitions to reopen the record for further hearing on (1) a Section 1.65 failure to report an impoundment order in a copyright infringement suit filed on May 1, 1984, and (2) a Section 1.65 failure to report an alleged trafficking issue filed May 29, 1984. At least in theory Amherst acknowledges that at this late stage in the case a request to reopen the record and add a new issue "is not to be made lightly." *Edgefield-Saluda Radio Co.*, 5 FCC 2d 148 (Rev. Bd. 1977).

18. The first request will be denied. Earlier in the case Hampshire had voluntarily notified the ALJ about the filing of the copyright suit. FCC 83M-1872, June 8, 1983. Subsequently, the Commission held that similar copying of engineering data "does not raise substantial questions regarding an applicant's ability to operate in the public interest." *Roanoke Christian Broadcasting, Inc.*, FCC 83-441, ___ RR 2d (Sept. 27, 1983). Thus, there was no obligation to report the impoundment order, nor could there have been any "intent to conceal," as Amherst claims, since the issuance of that order was widely reported in the communications trade press and the material was impounded from the Commission's files. A 1.65 issue has not been justified. See *Merrimack Valley Broadcasting*, 55 RR 2d 23, 25 (1983).

19. Finally, we turn to Amherst's 14th petition to enlarge issues which alleges that Section 1.65 was violated by the failure to report that one of Hampshire's principals proposed to sell a radio station in Connecticut, and that he may be trafficking in broadcast authorizations. Hampshire responds that the required applications had been filed with that Commission and it was awaiting approval of the sale before reporting it in this proceeding in accordance with past practice. FCC 84M-1595, March 30, 1984. It "demurs" to the trafficking charge because Amherst has failed to make the showing that the ALJ had previously required in this case. See FCC 81M-2951, September 17, 1981. Amherst's unjustified 14th petition is hereby denied. *Merrimack Valley, supra.*

20. *Summation*: Our decision rests upon the Chief ALJ's solid findings which we have affirmed. Both applicants are basically qualified and entitled to comparative consideration. Hampshire's substantial preference for bringing a new voice to its community of license, *I.D.* Conc. 34, together with its moderate preference for more efficient utilization of radio facilities because of Amherst's proposal to duplicate programming without countervailing benefits, ID Conc. 39, even when diminished by the demerits assessed by the ALJ, clearly outweigh Amherst's sole preference for participation of ownership in management, *I.D.* Conc. 36.

21. ACCORDINGLY, IT IS ORDERED, That Hampshire County Broadcasting Co., Inc.'s application (File No. BPH-9176) IS GRANTED; that the application of Amherst Broadcasting, Inc. (BPH-9566) IS DENIED; That Hampshire County Broadcasting Co., Inc.'s petitions for leave to amend application, filed April 18 and September 17, 1984, ARE GRANTED and the amendments ARE ACCEPTED; That Amherst Broadcasting Inc.'s petition for leave to amend filed April 16, 1984, IS GRANTED, and the amendment IS ACCEPTED; and that Amherst's petitions to reopen the record and enlarge issues filed May 1 and 29, 1984, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 84D-24

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Applications of	
Hampshire County Broadcasting Co., Inc. Amherst, Massachusetts	BC Docket No. 81-159 File No. BPH-9176
Amherst Broadcasting, Inc. Amherst, Massachusetts	BC Docket No. 81-160 File No. BPH-9566
For a Construction Permit for a New FM Station	

Appearances

Frank J. Martin, Jr. and *David A. Gross* on behalf of Hampshire County Broadcasting Co., Inc.; *Jerome S. Boros, Irving Gastfreund* and *Zave M. Unger* on behalf of Amherst Broadcasting, Inc. and *Robert A. Zauner* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ACTING CHIEF ADMINISTRATIVE LAW JUDGE THOMAS B. FITZPATRICK

Issued: April 3, 1984; Released: April 11, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Hampshire County Broadcasting Company, Inc. (Hampshire) and Amherst Broadcasting, Inc. (Amherst) for an FM radio station on Channel 265A at Amherst, Massachusetts.

2. By *Memorandum Opinion and Order* (FCC 81-108), released March 16, 1981, (*Designation Order*), the Hampshire and Amherst applications were designated for hearing on the following issues:

> 1. To determine with respect to the application of Amherst Broadcasting, Inc.:
>
> (a) whether it has complied with the Commission's directive contained in paragraphs 11 and 12 of the *Memorandum Opinion and Order* (FCC 78-912), released January 8, 1979;

(b) whether the March 9, 1979 amendment would result in a major change of the application pursuant to Section 73.3575(a)(1) of the Commission's Rules, and if so, whether circumstances exist which warrant a waiver of said section; and

(c) whether, in light of the evidence adduced pursuant to (a) and (b), above, the application is entitled to a comparative hearing.

2. To determine whether Amherst has complied with the requirements of Section VI of FCC Form 301.

3. To determine whether Amherst's proposal to duplicate programming is violative of Section 73.242(c) of the Rules, and, if so, whether circumstances exist which warrant a waiver of said section.

4. To determine which of the proposals would, on a comparative basis, better serve the public interest.[1]

10. [2] To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. The presiding Judge, by *Memorandum Opinion and Order* (FCC 81M-2061), released July 6, 1981, granted Summary Decision in favor of Amherst on issues 2 and 3. Amherst previously had been permitted to amend its application to eliminate programming duplication as a disqualifying factor and to cure the Equal Employment Opportunity policy question implicit in Issue 2. *Memorandum Opinion and Order* (FCC 81M-1793), released June 11, 1981.

4. By *Memorandum Opinion and Order* (FCC 81M-2951), released September 17, 1981, the Presiding Judge added three issues against Hampshire:[3]

5. To determine whether the proposal of Hampshire County Broadcasting Co., Inc. complies with 47 CFR 73.315(a), and, if not, whether circumstances exist which would warrant waiver of the Rules.

6. To determine whether Hampshire County Broadcasting Co., Inc. is financially qualified to construct and operate its proposed station.

7. To determine whether Hampshire County Broadcasting Co., Inc. complied with the requirements of 47 CFR 1.65, relative to the dissolution of its corporate status, and, if not, the effect of such failure on the basic and/or comparative qualifications of Hampshire County Broadcasting Co., Inc. to be a broadcast licensee.[4]

5. Prehearing conferences were held on May 18, 1981 (TR 1-52) and November 25, 1981. (TR 53-140) Hearing was held on December 7-11,

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[1] The Commission ruled that the areas and populations which would receive 1 mV/m service or greater, and the availability of other primary aural service would be considered under the standard comparative issue.

[2] For purposes of convenience, the issues have been renumbered.

[3] The three issues are referred to, respectively, as the "principal city coverage", the "financial", and the "1.65" issue.

[4] The burden of proceeding with the introduction of evidence and the burden of proof with respect to the three issues were placed on Hampshire.

December 14-18, 1981, March 3-4, 1982, March 22, 1982 and June 10, 1982. The record was closed on September 13, 1982 by *Order* (FCC 82M-2759), released September 13, 1982. The record was reopened by *Order* (FCC 82M-2952), released September 24, 1982. A post-hearing conference was held on September 23, 1982. The record was reclosed on September 27, 1982 by *Order* (FCC 82M-2972), released September 27, 1982.

6. Proposed Findings of Fact and Conclusions of Law and Replies were filed by Hampshire, Amherst[5] and the then Broadcast Bureau on October 5 and November 1, 1982, respectively.

7. The Presiding Judge, by *Memorandum Opinion and Order* (FCC 82M-3941), released December 15, 1982, further enlarged the issues to include an issue:[6]

> 8. To determine all of the facts and circumstances surrounding the submission of page 36 of Hampshire Ex. 6 into evidence and, in light of the evidence adduced, its effect on the basic and/or comparative qualifications of Hampshire County Broadcasting Company, Inc. to be a broadcast licensee.

A further hearing on this issue was held on March 10, 1983. (TR 2753-2960) Further Findings of Fact and Conclusions of Law and Replies were filed by Amherst, and Hampshire on April 22 and May 6, 1983, respectively.

8. Later, the Presiding Judge, by *Memorandum Opinion and Order* (FCC 83M-3575), released October 11, 1983, reluctantly enlarged the issues to include the following:

> 9. To determine whether Hampshire County Broadcasting Company, Inc. has maintained its local public file in accordance with the requirements of Section 73.3526(a) of the Commission's Rules and, if not, to determine the effect on Hampshire's basic and/or comparative qualifications.[7]

Further hearing was held on November 21 and December 1, 1983. By *Order* (FCC 83M-4527), released December 7, 1983, the Presiding Judge, *inter alia*, closed the record in this proceeding. Hampshire and Amherst filed additional Proposed Findings and Conclusions and Replies on February 28 and March 8, 1984, respectively.

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[5] Amherst filed an "Erratum" on October 8, 1982 and, on October 15, 1982, filed corrected copies of its findings.

[6] The burden of proceeding with the introduction of evidence and the burden of proof with respect to this issue were placed on Hampshire. A further hearing conference was held on January 19, 1982 with respect to the enlarged issue. (TR 2725-52)

[7] The burden of proceeding with the introduction of evidence and the burden of proof with respect to this issue were placed on Hampshire.

Findings of Fact

I. Issue 1(a) - Whether Amherst Complied With The Directive in Memorandum Opinion and Order (FCC 78-912), released January 8, 1979.

9. By *Report and Order*, released January 7, 1974, the Commission, upon petition filed by Hampshire, assigned Channel 265A to Amherst. (Hampshire Ex. 18, pp. 7-11) In assigning Channel 265A to Amherst, the Commission noted that "[i]n order to meet the minimum spacing requirements of our rules, a site 2 miles southwest of Amherst, Massachusetts, would be required. . . ." (Joint Ex. 1, para. 1; Hampshire Ex. 18, p. 7, footnote 1)

10. On August 14, 1974, Middlesex Broadcasting Co. (Middlesex) applied for Channel 265A. Middlesex was owned by Robert A. Morley and Mark H. Burmeister. On September 10, 1974, Hampshire filed its application for the Channel. (Joint Ex. 1, para. 2)

11. In April, 1975, Amherst filed a petition to deny directed against both the Middlesex and Hampshire applications. (TR 964-65)

12. The Hampshire-Middlesex merger agreement was signed in either June or early July, 1975. (TR 1004) At that time Hampshire and Middlesex were the only two applicants for Channel 265A. However, on July 14, 1975, Amherst filed its competing application for Channel 265A. (Joint Ex. 1, para. 4)

13. Despite the Commission's instruction in its *Report and Order* allocating Channel 265A to Amherst, that a site 2 miles to the southwest would be required in order to meet applicable minimum spacing requirements, Amherst specified as its transmitter site its existing AM Station WTTT tower, which is located 2 miles directly to the south of Amherst. (ABI Ex. 1, p. 3)[8] As a result, Amherst's site was 1.66 miles short-spaced to radio Station WGIR, Manchester, New Hampshire. No mention of this short-spacing was made in Amherst's application, nor was waiver of the Commission's minimum spacing regulations requested. (Joint Ex. 1, para. 4)

14. Edward H. Peene, Jr. (Peene), President of Amherst and General Manager of Station WTTT was aware, when he filed Amherst's application, that the site specified was short-spaced. (TR 1926) Peene also knew this to be a violation of the Commission's minimum separation requirements. However, Peene thought that the Station WTTT tower site deviation of 1.66 miles in spacing was minimal and that the Commission would approve it. (ABI Ex. 1, p. 3; TR 191, 392, 1925-33, 1976-77, 2183-85)[9]

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[8] Amherst Exhibits are referred to as ABI Ex.

[9] Peene did not know that he had to request a waiver. Amherst's engineering consultant was not aware of the short spacing when the application was filed and, therefore, didn't

15. Amherst's application was accepted for filing by the Commission on August 26, 1975. However, pursuant to Section 1.566(a) of the Rules, 47 CFR 1.566(a), the Commission returned Amherst's application on October 7, 1975, noting that it had been inadvertently accepted. The Commission's return of Amherst's application was predicated on the short-spacing to radio Station WGIR, as to which Amherst had not sought a waiver. (Joint Ex. 1, para. 7)

16. On November 6, 1975, Amherst filed its first "Petition for Reconsideration and Reinstatement of Application" requesting a waiver of the minimum requirements of Section 73.207, 47 CFR 73.207. (Joint Ex. 1, para. 8)

17. Hampshire filed an Opposition to Amherst's reconsideration request and, on April 19, 1976, filed a "Petition To Dismiss" Amherst's application. On April 27, 1977, Hampshire filed with the Commission a "Petition for Prompt Ruling, On Long Pending Waiver Request of Amherst Broadcasting, Inc., And For Grant of Hampshire County Broadcasting Co., Inc.'s Application or Prompt Designation of the Two Applications for Hearing on Appropriate Issues." Hampshire's request for a prompt resolution of the matter, or prompt designation for hearing, was opposed by a series of Amherst pleadings. (Joint Ex. 1, paras. 8 and 11)

18. In the fall of 1978 Peene "learned" that it was unlikely that Amherst's request for a waiver of the minimum spacing requirement would be granted. (TR 2070, 2005-06)

19. In December, 1978, "somewhere between the 18th and the 22nd", Peene learned that the Commission had decided to issue an order rejecting Amherst's waiver request and providing it with only 30 days to find a new site. (TR 1890, 1922-1925) Peene acknowledged that during the period from the Commission's rejection of Amherst's application in October 1975, until Amherst learned of the Commission's action in December 1978, rejecting its waiver request, Amherst made no effort to locate an alternative site to use in the event the Commission rejected Amherst's waiver request.[10] (TR 1925)

(a) Amherst's Efforts to Comply With the January 8, 1979 Order (FCC 78-912)

20. On January 8, 1979, the Commission released its December 21, 1978, *Memorandum Opinion and Order* (January 1979 *Order*), FCC 78-

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request a waiver. He explained that "somebody slipped up" and that he was "chagrined" when the Amherst application was returned. (TR 236-40, 430)

[10] Until the late fall of 1978, Peene expected that the waiver would be granted. (TR 1981, 1990) His opinion of the economic situation in the Amherst market and that the FM antenna should be on AM Station's WTTT tower had not changed. (TR 2007)

912, denying Amherst's waiver request. In that document, the Commission noted that the Hampshire application specified a fully-spaced site and stated that:

> "affording [ABI] thirty days to amend to a site in compliance with Section 73.207 would serve the public interest. If [ABI] does not exercise this opportunity to amend and comply with Section 73.207, its application will be dismissed." (at p. 5, para. 11)

The Commission directed that Amherst's application would "be retained for a period of thirty (30) days to permit amendment to a non-short spaced site." (January 1979 *Order* at p. 5, para. 12)

21. After learning of the Commission's planned action denying his waiver request, Peene instructed his engineers to prepare a map showing where the antenna could be placed so as to comply with the Commission's technical regulations. (TR 2013) In addition, between Christmas and New Years Day, he drove through the Amherst area to review possible sites.[11] (TR 2176) By letter dated January 4, 1979, Amherst's engineers, at the request of Amherst's communications counsel, sent Peene topographic quadrangle maps showing the area where he could locate his antenna without being short spaced ("the window"). (TR 246-49, 2014-15; Hampshire Ex. 14) The day after Peene received the engineering map, he undertook to find a site within "the window" and from which the Town of Amherst could be served. (TR 2014-18, 2176) He drove to a ridge which he had previously inspected and selected the most advantageous place to locate his antenna. Peene then asked his engineer to do a preliminary engineering study on that site's feasibility. (TR 2176-79) After speaking with the farmer who owned the land and determining that the land was available, Peene instructed his engineers to prepare final engineering utilizing the site. (TR 249-50, 2034-42, 2178-81)

22. When the engineers advised that they could not complete the engineering amendment within the 30-day period specified in the January 1979 *Order*, Amherst, on February 5, 1979, submitted a letter to the Commission, noting that Amherst had secured a new site and requesting an extension of 30 days to March 8, 1979 in Order to complete the engineering presentation.[12] (Joint Ex. 1) The February 23, 1979 amendment specifying the Whately site was filed on February 26, 1979. (Joint Ex. 1, paras. 13 and 15; TR 392, 2042-46, 2050)

23. The amendment was filed after approximately three weeks of negotiations with the farmer who owned the land. The reason that the

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[11] Peene investigated a possible site in the town of Hadley, but discovered that there was opposition in that community to his locating Amherst's tower there. (TR 2020)

[12] On February 7, 1979, Hampshire requested the Chief, Broadcast Bureau to dismiss Amherst's application for failure to amend pursuant to the January 1979 *Order* and on February 8, Hampshire opposed the Amherst extension request. (Joint Ex. 1, para. 13) The extension request was not acted upon by the Commission.

negotiations with the farmer required three weeks was because he drove a truck during the week and was only available to meet Peene on Saturday afternoons. (TR 2038-39)

(b) Amherst's Withdrawal of the February 3, 1979 Amendment and Submission of the March 9, 1979 Amendment

24. On February 27, 1979, Hampshire wrote the Commission noting that the Amherst's February 23, 1979, amendment appeared to be a major amendment which required dismissal of Amherst's application. (Joint Ex. 1, para. 15)

25. Amherst's engineer acknowledged that his firm had simply made an error in failing to consider the major change implications of the amendment and that, had he realized that the amendment constituted a major change, he would never have signed and filed the amendment. (TR 250-54) The engineer first learned that the amendment constituted a major change as a result of the letter sent to the Commission raising the matter by Hampshire's counsel. (TR 255-56) The engineer checked the allegation, found it to be correct, and so informed Peene and Amherst's counsel. (TR 258)

26. After filing the amendment, Peene had gone on vacation to Florida.[13] (TR 2055) While in Florida, Peene received a telephone call from his attorney who told him that the February 23, 1979 amendment had to be withdrawn because the amendment was a major amendment in that it resulted in a more than 50% change in Amherst's coverage area. (TR 2055-59, 2183) Counsel advised Peene that he had to return home to search for a new site meeting the 50% test. (TR 2056-58, 2100-25)

27. At the time of submission of the February amendment, Peene had no familiarity with the concept of a "major amendment". (TR 2047, 2057, 2182-83) The engineer who signed the engineering portion of the amendment was not aware that it constituted a major amendment. (TR 250-55) The "major amendment" problem first was brought to Amherst's attention by receipt of the February 27, 1981 Hampshire letter, requesting dismissal of the Amherst application, as amended, on the ground it entailed a "major amendment". (Joint Ex. 1, para. 15; TR 255-59, 392)

28. The next day, before returning to Massachusetts, Peene called his office and had his bookkeeper review the map his engineer had provided for other possible site locations.[14] A new potential site was located, and

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[13] Peene did not recall the date of his visit to Florida.

[14] The map the engineer provided Peene to use in locating a new antenna site showed arcs designating mileage separation requirements and an arc eight miles from the far corner of Amherst. The arc placed in relation to Amherst was there to insure that Amherst did not have a city coverage problem with its new site. Peene was then asked to locate a site within the arcs, plus keeping in mind the problem that a 50% change in coverage would create. (TR 263)

through the tax office the identity of the owners was ascertained. Peene, while still in Florida, called the owners, Mr. and Mrs. Jaque, whom he knew, and determined that their land was available. He then notified Amherst's engineers of the existence and location of the Jaque site. (TR 264-65, 2076; 2086)[15] On returning to Massachusetts, within two days of learning of the problem with his site, Peene visited the Jaque family and continued contact with his engineers. (TR 2058-59; 2105-07; 2164-69)

29. When the engineers finished their analysis of the Jaque site, Peene visited Washington, D.C., to work on preparing the amendment specifying the Jaque site for filing with the Commission. (TR 2090-2102, 2109) On March 8, 1979, Amherst requested withdrawal of the February 23, 1979, amendment.[16] On March 9, 1982, Amherst filed an amendment specifying the Jaque site. (TR 2102; Joint Ex. 1, p. 5) At the time he executed the March 9 amendment, Peene was aware that the 30 days extension of time Amherst had requested on February 5 had expired on March 8, 1979. (TR 2104-5) Amherst also filed on March 9 a "Petition For Acceptance of Amendment". Hampshire's proposed findings, paragraphs 38 and 43-50 cite the representations made in Amherst's "Petition for Acceptance of Amendment" and contrasts these representations with testimony given in this proceeding. These findings are summarily rejected. The pleading is not part of this record and the Amherst principals were never given an opportunity to explain the purported contradictions. Additionally, it is found that Peene was not guilty of misrepresentation or lack of candor when he represented in the "Petition For Acceptance of Amendment" that he undertook to find a new site upon receipt of the January 1979 *Order*. Peene was forthright in explaining this matter and the Presiding Judge who observed his demeanor concludes that Peene was not attempting to mislead the Commission as to when he first undertook to find a new site.

30. On May 23, 1979, Amherst filed a clarifying amendment to show that the March 9th amendment was a "minor" amendment. (Joint Ex. 1, para. 19; Hampshire Ex. 1; TR 268, 334, 449) On August 1, 1979, the Broadcast Bureau returned the March 9th amendment on the ground it was a major amendment filed after the applicable cut-off date. (Joint Ex. 1, para. 20; TR 392, 2147) On August 31, 1979, Amherst filed a "Petition For Reconsideration" of the dismissal. (Joint Ex. 1, para. 21; TR 392, 2148)[17]

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[15] Peene understood that Amherst's engineers would prepare an optimum proposal consistent with spacing, coverage of Amherst and the 50% major amendment rule. (TR 2095-96, 2098-99)

[16] This amendment was returned on March 13, 1979. (Joint Ex. 1, para. 16)

[17] As noted, *supra*, issue 1(b) seeks to determine whether the March 29, 1979, amendment is a major amendment.

II. Issue 1(b) - Whether the March 9, 1979 Amendment Is a Major Change of Amherst's Application and, If So, Whether Waiver Is Warranted

31. The Commission, in the *Designation Order*, reviewed the contentions of Amherst's and Hampshire and concluded that a "substantial and material" question of fact exists with respect to the calculation of Amherst's 1 mV/m contour predictions and the applicability of the "major change" and new file number requirements of the Rules; namely, Section 73.3573 of the Rules, 47 CFR 73.3573. The cited rule provides:

> "(a)(1) . . . A major change for FM stations authorized under this Part is . . . any change in power, antenna location, or height above average terrain (or combination thereof) which would result in the change of 50% or more in the area within the station's predicted 1 mV/m field strength contour. (A change in area is defined as the sum of the area gained and the area lost as a percentage of the original area). . . ."

32. There is a conflict as to whether there is a "major change" (i.e., more than 50%) in coverage area (1 mV/m or 60 dBu) as between the original Amherst 1975 proposal and the March 9, 1979 amendment. Whether there is a "major change" depends on a comparison of the areas encompassed within the 1 mV/m service contours of the two proposals.

33. The determination of the 1 mV/m contours of the 1975 proposal and the March 9, 1979 amendment involves the following processes:

(1) The determination of effective antenna height above average terrain from 2-10 miles on each of 8 or more equally-spaced radials originating at the proposed antenna, involving the plotting of at least 50 points at 1/10 mile intervals over the 2-10 mile section on each radial of the elevation (height above mean sea level) of the terrain shown on topographic or other maps (47 CFR 73.312 and 73.313(d));

(2) the plotting, from FCC propagation curves, of the distance a 1 mV/m (60 dBu) FM signal will go on each radial for the radiated power and effective height of the antenna (step 1) on that radial, and/or the use of discretionary alternative methods (such as National Bureau of Standards Technical Note 101) determining coverage where the height above average terrain is negative or small or where obstructions limit the signal (TR 270, 278, 281, 287, 288, 1039) (47 CFR 73.313(c)); and

(3) connecting the 8 (or more) plots made in step 2 by curves so as to get a continuous 1 mV/m (60 dBu) contour around 360° of the site and determination of the circumscribed area (TR 286, 291, 300, 302-32, 425-26, 541, 1032-22).

(a) Hampshire's Depiction of Amherst's 1975 and March 9, 1979 1 mV/m Contours and Percentage Change

34. Perry, a principal of Hampshire, calculated the change in Amherst's 1 mV/m contour that resulted from Amherst's 1979 amendment changing its antenna site. According to Perry's calculations, the amount of change was anywhere from 51.5% to 81%, depending on the methodolo-

gy utilized. (Hampshire Ex. 1)[18]

35. In drawing the contours on which he estimated the percent change in coverage area from Amherst's 1975 site to its 1979 site, Perry drew a curve to a point on a radial and then abruptly changed the direction of the curve leading off that point to the next point. (TR 529-30; Hampshire Ex. 1, pp. 14, 15 and 16) Perry calculated the area change in square miles by plotting the 1975 and 1979 contours on graph paper and counting the number of squares within their contours.[19] Where a square was bisected by the contour, Perry estimated the portion of the square which fell within the contour. (Hampshire Ex. 1, pp. 4, 14, 15 and 16; TR 535-36)

36. Frederick D. Schottland, an expert in matters of electrical propagation and engineering[20], testified on behalf of the Bureau. He explained that, in drawing his contours with abrupt changes in direction at each point along the contour at which a radial had been drawn, Perry did not conform to acceptable engineering practice. According to Schottland, the accepted practice in connecting points along radials to construct a contour is to draw a "smooth curve". Schottland further explained that Perry's contours were constructed using a "series of smooth curves . . ." which only considered "two points at a time. . . ." Schottland expressed the opinion that this methodology is unacceptable engineering practice." (TR 1029-29, 1032-35)

(b) Amherst's Depiction of Its 1975 and March 9, 1979, 1 mV/m Contours and Percentage of Change

37. Amherst's engineer, Ralph E. Dippell, Jr., (Dippell)[21] calculated the percentage change in area that Amherst would cover with its 1 mV/m signal as a result of Amherst's change in site to be 47%. (ABI Ex. 1; TR 166, 172, 436-39) of the 1975 and 1979 proposals. The distances to the 1 mV/m contours were calculated along 16 radials. Along those radials on which the height above average terrain (HAAT) was less than 100 ft., Technote 101 was utilized.[22] Dippell also utilized Technote 101 along the 180° and 202.5° radials even though the height above average terrain was

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[18] Perry is not licensed to practice engineering. (TR 466) Nor is he a graduate of an engineering school. (TR 469) However, Perry does hold a first class FCC license and his qualifications re depicting 1 mV/m contours has been accepted by the Commission. (TR 599)

[19] Each square represented an area of 0.16 square mile.

[20] His expertise was stipulated to by the parties. (TR 1028-29)

[21] Dippell is a graduate professional engineer and past President of the Association of Federal Communications Consulting Engineers, and has had 35 years professional experience in drawing FM contours. (TR 287, 421-23, 429)

[22] Technote 101 was utilized along these radials because the Commission's prediction curves are not designed for areas where the HAAT is less than 100 ft. Section 73.313 of the Rules. Dippell used a computer based method for predicting shadow loss due to terrain according to the National Bureau of Standards Publication Technical Note 101

greater than 100 ft. According to Dippell, he utilized Technote 101 for these two radials because they transected the Holyoke Range and the terrain along these radials departed widely from the average elevation in the 2-10 mile sector.[23] For those radials on which the HAAT was greater than 100 feet, excluding the 180° and 202.5° radials, figure 1 of 47 CFR 73.333 was utilized. Dippell's calculations are as follows (ABI Ex. 1):

Radial Bearing	*May 1975 Effective Height*	*Distance to Predicted 1mV/m Contour*	*March 1979 Effective Height*	*Distance to Predicted 1mV/m Contour*
Degrees	Feet	Miles	Feet	Miles
0	(–) 207	8.3+	57	8.35+
22.5	(–) 608.5	9.1+	(–) 118	9.2+
45	(–) 475	5.7+	(–) 325	9.6+
67.5	(–) 461	4.75+	(–) 185	7.2+
90	(–) 451	3.4+	(–) 278	5.6+
112.5	(–) 391	5.4+	(–) 70	8.5+
135	(–) 111	9.5+	137	9.8
157.5	(–) 21	8.9+	92	9.6+
180	37	8.4+	163	3.8+
202.5	14	4.0+	235	4.1+
225	25	5.3+	340	15.3
247.5	214	12.0	280	13.8
270	176	11.0	207	11.9
292.5	129	9.4	115	8.8
315	179	11.1	172	10.9
337.5	(–) 51	8.9+	295	14.2

+ Based on the Technote 101 supplemental showing

38. After determining the location of the pertinent contour points on the 16 radials for the 1975 and 1979 proposals, Dippell connected these points by drawing smooth curves shaped by recognizing where unique topographic features are present between the radials.[24] (TR 285-87, 293, 297, 299-300, 424)

39. Dippell and Shottland acknowledged that the major change question is influenced by how curves are drawn. (TR 292, 441, 1062, 2603-06) Dippell conceded that he did not know what the percentage change would be if curves were drawn without regard to the terrain between the radials. (TR 287) Dippell explained that the facts are "so close", and the tools available have such "built-in lack of precision," that it is "impossi-

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(Revised January 1, 1967), entitled Transmission Loss Predictions for Topographic Communications Circuits (Technote 101).

[23] 47 CFR 73.313 authorizes supplemental showings along such radials.

[24] Schottland expressed the view that Dippell's method of charting the points on the radials was "complete accurate." However, he did not consider terrain other than along the radials. (TR 1057) He drew a smooth curve and refined the curve to get the closest fit. (TR 1032)

ble" to come up catagorically with the answer, and that "you can get an answer below 50 percent just as easily as you can get one above 50 percent." (TR 2483-84) For this reason, Dippell further explained that engineers can be expected to differ on the exact location of a 1 mV/m contour and an area encompassed within that contour. (TR 286-92, 2603-05)

(c) Perry's Evaluation of Amherst's Depiction of The 1975 and 1979 1 mV/m Contours and Percentage of Change

40. Perry recalculated Amherst's 1975 and 1979 contours utilizing the basic data and contours used by Dippell. Perry recalculated the height above average terrain by reading points every tenth of a mile along the radial beginning at 2.0 and ending at 10.0 miles from the proposed antenna site. Using the recomputed heights, Perry read the Commission's F (50/50) curves to obtain distances to the 1 mV/m contours. Perry then compared the distances to the 1 mV/m contour he had obtained with those obtained by Dippell. (Hampshire Rebuttal Ex. 1, pp. 2-5)

41. Based on this comparison, Perry concluded that on the 247.5° and the 292.5° radials, Dippell's distance to Amherst's 1975 contour was off by 2 miles and 1 mile, respectively. (TR 2302; ABI Ex. 10) In addition, Perry concluded that on the 247.5°, and the 337.5° radials, Dippell's calculations to the 1979 contour were off by .2 mile and .8 mile, respectively. In addition to contesting Dippell's calculations as to the distance to these contours along the cited radials, Perry also contested Dippell's plotting of the 1.mV/m contour along the 270° radial for the 1979 site. Based on his revised calculations, Perry concluded that Amherst's antenna move had resulted in a change in its 1 mV/m area from the 1975 site to its 1979 site of 52.4%, rather than the 47% change calculated by Dippell. (Hampshire Rebuttal Ex. 1)[25]

(d) Dippell's Evaluation of Perry's Depiction of a 52.4% Change

42. Dippell recalculated the 1975 and 1979 contours using the elevation data provided by Perry to calculate the distances to the contours. Using the Commission's curves, Dippell came to a slightly different distance to the 1 mV/m contour than Perry had calculated. Along the 247.5° radial, Dippell was of the view that, as he read the curves, the distance to the contour was 12.0 miles while Perry's had calculated the distance to be 11.8 miles. (TR 2301-05) Based on his restudy and using Perry's elevation, Dippell calculated that the percent change from Amherst's 1975 site to its 1979 site was 49.4%. (TR 2303-04, 2491-92, 2615-

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[25] Perry, after correcting the purported errors, drew curves connecting the points on the radials having smooth curves and also drew curves connecting these points having shapes similar to the curves in ABI Ex. 1. (Hampshire Rebuttal Ex. 1; TR 499, 1029)

17; ABI Surrebuttal Ex. 19)[26]

43. Dippell explained that the purpose for his utilization of Perry's data was to demonstrate that, because of the lack of precision in the data, one could come up with different results depending on determining the elevation of each of the points over the 2 - 10 miles for each radial; how one read the propagation curves and how one connected the points along the radials which formed the 1 mV/m contour. (TR 2301-05, 2483-84; ABI Ex. 19, pp. 4-5)

III. Issue 5 - Whether Hampshire's Proposal Complies With 47 CFR 73.315(a) and, If Not, Whether Waiver Is Warranted

44. The Presiding Judge, by *Memorandum Opinion and Order* (FCC 81M-2951), released September 17, 1981, enlarged the issues to determine whether the Hampshire proposal complies with 47 CFR 73.315(a)[27], and, if not, whether circumstances exist which would warrant waiver of the cited rule. It was noted that Hampshire's proposal, when amended on July 28, 1975, fully complied with 47 CFR 73.315(a), but, subsequently, the Commission adopted new (50/50) curves[28] used for adopting height above average terrain (HAAT) which resulted in Hampshire failing to place a 3.16 mV/m contour over all of Amherst.

(a) Background re Hampshire's Efforts To Have FM Channel 265 Allocated To Amherst and Its Concept of The Proposed Service Area

45. No FM channel was originally assigned to Amherst in the Commission's FM Allocation Table. In 1973, Hampshire filed a "Petition For Rulemaking" (*Petition*) requesting the Commission to Assign Channel 265A to Amherst. (Hampshire Ex. 6, pp. 26-30; TR 653, 684, 920-23) Hampshire noted that the assignment would permit the "first full-time commercial voice" to Amherst, the fastest growing community in Hampshire County. The *Petition* emphasized that the proposed assignment would be "especially efficient in the coverage of the major population centers" in Hampshire County.[29] The *Petition* avowed that County-wide

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[26] Dippell was to prepare an exhibit with respect to this study. (TR 2305-06) However, this study was never produced. (TR 2642) It was Amherst's position that its offer as to the percentage change was ABI Ex. 1 and that Amherst's surrebuttal Ex. 19 was solely an analysis of Perry's product. (TR 2479-80)

[27] 47 CFR 73.315(a) provides that the transmitter location of an FM station shall be chosen so that a minimum field strength contour of 3.16 mV/m will be provided over the entire principal community to be served.

[28] *Report and Order*, 53 FCC 2d 855 (1975)

[29] It was pointed out that the assignment could provide 75% of the County population with a 70 dBu signal and 90% of such population with a 60 dBu signal from an "optimized transmitter location" as shown in Figure 2 of the Engineering Report, attached to the *Petition*.

coverage "is . . . the kind of coverage we would seek in practice if the channel is assigned . . . ."[30]

46. The Engineering Report accompanying the *Petition*, prepared by Perry, represented that a transmitter site at least two miles west or southwest of Amherst Center would be required because of spacing requirements and that Hampshire did not forsee any problems in finding a "good site in the relatively large area available." (Hampshire Ex. 6, p. 33) The Engineering Report further noted that an optimized site would permit service to substantially all of the population of Hampshire County. The Engineering Report listed each town and city in the County and in adjacent Hampden and Franklin Counties which would be encompassed, in whole or part, within the 70 and/or 60 dBu contours (and the population in each community to receive such service) of the projected operation from the optimized site.[31] (Hampshire Ex. 6, pp. 34-36)

47. When Hampshire's application was filed on September 10, 1974, it proposed a site located in Hadley, Massachusetts, which was 1.72 miles short spaced to Station WTYD, New London, Connecticut. It requested a waiver of the spacing rule. When it amended its application in March 1975, to specify a new site 2.37 miles short spaced to Station WTYD, it again requested a rule waiver. Later, on July 28, 1975, Hampshire amended to the Middlesex site[32], which, at that time, fully complied with the minimum spacing requirements and 47 CFR 73.315(a), the city coverage requirements. It also allowed for the specification of maximum Class A facilities. (TR 703, 813-14; Joint Ex. 1, pp. 1 and 2) As noted, *supra*, the subsequent change in the method of determining the location of the 3.16 mV/m contour resulted in the specification of the city coverage issue by the Presiding Judge on September 17, 1981.

(b) Amherst's July 28, 1975 Amendment Specifying The Middlesex Site

48. In April or May, 1975, prior to Hampshire's amending to specify the Middlesex transmitter site, Perry checked earlier engineering studies to insure that the site could, in fact, provide full city grade coverage. (TR 813-15) He found that there was approximately a half-mile clearance. (TR 815, 825, 872) Since that site met all Commission regulations, on July 28, 1975, Hampshire formally amended its application to specify it. (Joint Ex. 1, para. 5)

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[30] The *Petition* also noted that the proposed assignment could also serve a "substantial percentage" of the inhabitants in Hampden County.

[31] Paragraphs 28(c), 29, 30 of Amherst's proposed findings are summarily rejected as not part of the record.

[32] Middlesex Broadcasting Co. had filed a mutually exclusive application for Channel 265. Hampshire and Middlesex merged and Hampshire amended to specify the Middlesex site in the Saw Mills section of Northhampton, Massachusetts.

49. Perry, who was holding himself out as doing engineering work in the FM field at the time in April or May 1975 was not aware that a Notice of Proposed Rulemaking had been issued contemplating a change in the 50/50 curves used to determine the location of contours. (TR 816) He was unaware of the new curves prior to their adoption by the Commission on June 27, 1975. He learned of the new curves in late July or early August 1975 and he applied the new curves to FM engineering proposals he prepared after August 1, 1975, the effective date. (TR 813-23, 826-28, 877-78)[33]

50. Perry explained that the Commission's changes to its 50/50 graphs were so subtle that he never considered the possibility, prior to Amherst's filing on May 7, 1981 its "Petition to Enlarge Issues," that Hampshire's transmitter site might not provide full city-grade coverage to the entire Town of Amherst. (TR 827-828)[34]

(c) Failure To Comply With 47 CFR 73.315(a), City Coverage

51. Amherst's land area is 27.6 square miles. The town forms a rough rectangle, about 10 miles north to south and 5 miles east to west. According to Dippell, Amherst's Engineer, Hampshire's predicted 70 dBu contour will not include 2.5 square miles (9.4%) of this total land area. (TR 2536; ABI Ex. 20, pp. 3, 4, 7) Hampshire's engineering study, done by Perry, indicates that Hampshire's 70 dBu contour will not include 1.5 square miles (5.4%) of the total land area. (Hampshire Ex. 6, p. 10)[35]

52. Amherst is a New England town. New England towns are not organized on the traditional city, town, county, unincorporated area that is used in most of the country. All of the land of Massachusetts is divided among the towns, making the town analogous to county boundaries in other parts of the country. (TR 628-30, 956-58) In Massachusetts the political sub-divisions called "towns" are analogous to "counties" in most parts of the United States. (TR 629, 956-58) They are the divisions into which the larger New England counties are subdivided, and their boundaries are not determined by population centers. (Hampshire Ex. 6, p. 10; TR 628-29)

53. The two population centers of the Town of Amherst, as recognized by the U.S. Census, are "Amherst Center" and "North Amherst." Hampshire's proposal will provide a radio signal stronger than required to

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[33] As noted, *supra*, in 1975, the Commission issued a *Report and Order*, 53 FCC 2d 855; 34 RR2d 361 (1975), adopting, as of August, 1975, new 50/50 graphs to be used to compute the distance to predicted service contours.

[34] According to Perry, the Commission's changes to its 50/50 graphs were very subtle, with only some samll differences in the case of higher elevations, so that Class A stations would not normally be affected. (TR 823, 825, 877-78)

[35] Outside the 70 dBu contour and within the town of Amherst are two triangular areas at the northeast and southeast corners of Amherst.

provide city grade coverage to both "Amherst" and "North Amherst". (TR 955-56, 1283-86; Hampshire Ex. 2, p. 7; Hampshire Ex. 6, p. 15)

54. As noted, *supra*, the only areas of Amherst that will not receive a city grade (3.16 mV/m) signal are two triangular areas located a distance from the town's population centers. One such area is in the northeast corner and the other is in the southeast corner of Amherst. (Hampshire Ex. 6, pp. 13-15)

55. The shortfall area in Amherst's northeast corner is characterized geographically by mountainous terrain, including Mt. Boreas. Similarly, the shortfall area in Amherst's southeast corner is mountainous in part, and swampy elsewhere.[36] (Hampshire Ex. 6, pp. 5, 13-14; TR 857-58)

56. On May 15, 1981, Morley conducted a house count survey of the area of Amherst which is within the Amherst town limits but outside Hampshire's proposed 70 dBu service contour. He conducted his house count survey by personally driving and hiking through all of the subject area and counting the number of dwelling units located there. (Hampshire Ex. 6, p. 25; TR 869, 1549) As a result of his survey, Morley counted a total of 79 single family houses located outside Hampshire's proposed 70 dBu service contour but within Amherst's town limits. (Hampshire Ex. 6, pp. 10, 25; TR 1612-15)

57. According to preliminary 1980 U.S. Census figures, there are 33,210 persons residing in Amherst, occupying 7,680 housing units. This results in an average of 4.32 persons per dwelling unit. On this basis, the 79 counted units are found to be occupied by 341 people, or by approximately 1 percent of the population of Amherst. Hampshire's proposal, therefore, will serve approximately 99 percent of the residents in Amherst with primary city grade coverage. (Hampshire Ex. 6, p. 10)

58. On March 29, 1982, Morley conducted a second house count to determine the population that resides in the area which Amherst claims in its Exhibit 20 to be inside the Amherst town limits but beyond Hampshire's proposed 70 dBu signal. Using the same procedures as before Morley determined that a total of 639 persons, or 1.89 percent of the population of the town, reside in that area. (Hampshire Ex. 24, p. 1; TR 2696)

(d) Hampshire's Efforts re Compliance With 47 CFR 73.315(a), City Coverage

59. In May, 1981, when Hampshire's principals first learned of its coverage problem (TR 828, 878, 1282) under the changed 50/50 graphs, they undertook to locate a new transmitter site which could provide full city grade coverage to all of Amherst under the Commission's revised 50/

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[36] The town of Amherst includes swamp area as well as population centers. (ABI Ex. 20, p. 7)

50 graphs. (TR 879, 889) As part of this effort, Perry, Burmeister, and Morley reviewed all of the original site work that they had done over the years and attempted to discover a new site which might provide full coverage to Amherst and not violate any other Commission rule. (TR 881-82, 1276, 1587)

60. As noted, *supra*, Amherst is a New England town with unique characteristics. Hampshire's principals encountered problems in locating a new transmitter site that would provide full city grade coverage to all of Amherst, including its extended corners. They discovered difficulties because of Amherst's size and shape, and the mountainous terrain in the area. (TR 879, 899-903)

61. Hampshire's principals studied terrain maps and terrain profile graphs to locate sites which would fully comply with the Rule. They discovered that if Hampshire moved its transmitter site east, in the direction of Amherst, the terrain becomes lower and Hampshire's antenna's height above average terrain would, as a result, be lower. If Hampshire's transmitter site were lower, as compared to the average height of the surrounding terrain, then Hampshire's proposed 70 dBu signal would not travel as far and coverage would, in consequence, be less in the Town's remote corners. (TR 879-82, 89-92, 900-01, 929-34, 1587)[37] Because of the terrain surrounding Amherst, Hampshire was faced with the situation that if it moved its transmitter site closer to Amherst, it would result in less of Amherst being covered by a city grade signal than from its present location. (TR 892, 1587)

62. As noted, *supra*, Hampshire's principals re-evaluated all the sites that had been previously considered and found none suitable. Perry, claimed that if they had found a site that was fully-spaced and that covered all of Amherst with the required 70 dBu signal, such a site would have been considered. But, Perry and Morley did not recall locating such a site. (TR 878-883, 1587) According to Morley, he and Perry analyzed moving the transmitter in various directions and found that to do so would just make matters worse. (TR 1587).[38]

63. Morely, in addition to reviewing maps, personally visited Amherst and investigated the possibility of utilizing the site which had been proposed by Middlesex in Hadley. In this regard, he contacted Mr. Elder who owned Mt. Warner, where Middlesex had originally intended to locate its antenna. Elder informed him that, in his (Elder's) opinion, the political

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[37] According to Perry, as the antenna was moved east, to get the same coverage as at its present site, it was necessary to increase antenna height above average terrain. However, two airports are located to the east and, consequently, the necessary tower height increases were not possible. (TR 881)

[38] Morley, who holds an engineering degree from Tufts University, has had professional experience interpreting topographical maps. (TR 1610-12)

climate in Hadley was such that it would still be impossible to construct an antenna on Mt. Warner. According to Morley, he relied on Elder's representations in this regard because Elder owned a great deal of property in the area and knew the political climate in Hadley was such that it would still be impossible to construct an antenna on Mt. Warner. Elder discouraged Morley from proposing Mt. Warner, even though the use of Elder's Mt. Warner property for Hampshire's antenna would have been financially advantageous to Elder. (TR 1586-96)[39]

64. Since one small area of Amherst that will not receive full city-grade coverage is in the far northeast corner, and the other small area is in the far southeast corner, Hampshire could move its transmitter site either north or south without worsening its coverage short-fall in the opposite remote corner of the Town. (TR 890, 893-94, 900, 945-46, 1259) If Hampshire were to move its transmitter site west, it would be at a lower elevation on the Sawmill Hills Ridge and, in addition, would be farther from the Town, and would in consequence cover less of the Town with a full city-grade signal. (TR 893) If Hampshire were to relocate far enough to the west to attain higher elevation, it would be short-spaced with a radio station in Albany, New York. (TR 893, 900)

65. Hampshire's principals also reevaluated sites that had been considered by Hampshire's principals prior to choosing its current site. (TR 881) Burmeister and Morley had previously studied alternative transmitter sites prior to choosing the site now specified by Hampshire. These earlier site studies involved both theoretical, technical evaluations, and personal inspection. Hampshire's principals had, at that time, evaluated sites near the center of the Town of Amherst and, in North Amherst, which they learned were short-spaced to Station WGIR, Manchester, New Hampshire. They had also previously evaluated and personally inspected seven new sites to no avail. (TR 1258) No site had been found that met the Commission's rules regarding short-spacing and full city-grade coverage, which could be specified without resulting in a major change.[40] (TR 882, 913, 951, 1253-59)

IV. Issue 6 - Hampshire's Financial Qualifications

(a) Hampshire's Financial Amendments

66. A financial issue was added by the Presiding Judge because Hampshire had indicated an intention to replace its equipment proposal

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[39] Morley, explained that while it was within the zoning laws of Hadley to erect a tower, a special permit would have been required. (TR 1589)

[40] Hampshire's ability to cover all of Amherst with a city grade signal was also hindered by the fact that Amherst is within 200 miles of Canada, and thus is prevented from raising its antenna tower height above the height now specified without also reducing its proposed power. (TR 896)

but, at the time of the Presiding Judge's ruling adding the issue, had not done so, and also because Hampshire's bank letter had become out-of-date. *Memorandum Opinion and Order* (FCC 81M-2951), released September 17, 1981.

67. Hampshire provided its substitute equipment proposal by an amendment tendered for filing on August 20, 1981, and accepted by the Presiding Judge by *Memorandum Opinion and Order* (FCC 81M-3176), released October 7, 1981.

68. On October 26, 1981, Hampshire tendered an amendment apprising the Commission and the parties that its bank letter previously relied upon had been withdrawn by the bank, and that Hampshire was pursuing other arrangements for funding construction and initial operating expenses. This amendment was accepted by *Memorandum Opinion and Order* (FCC 81M-3592), released November 10, 1981.

69. On November 25, 1981, Hampshire tendered for filing an amendment setting forth the loans from a bank and principals that it would rely on for construction and initial operating costs of its proposal, in place of the withdrawn bank letter. This amendment to Hampshire's application was accepted by ruling of the Presiding Judge announced on the record at the hearing on December 8, 1981. (TR 354-69)[41]

(b) Cost of Construction and Operation[42]

70. Hampshire anticipates construction and three months operating costs of $165,734 (Hampshire Ex. 9, p. 9; ABI Ex. 23, p. 23; TR 694, 2654). These costs are as follows:

Engineering Equipment	$ 86,462
Buildings	6,000
Legal	22,000
Installation	700
Miscellaneous	10,000
Total Construction Cost	$125,162
Cost of Operation (for 3 months)	40,572
Total Cost	$165,734

(c) Funds Available To Meet Cost of Construction and Operation

71. To meet these costs Hampshire relies on the following sources of funds (Hampshire Ex 9.):

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[41] This ruling was contemporaneously confirmed by *Order* (FCC 81M-3896), released December 10, 1981.

[42] The Presiding Judge ruled that the financial issue was limited to the question of the availability of funds necessary to construct and operate the proposed facility and did not encompass inquiry into the costs of construction and operation. (TR 1544, 1843)

Loans	
Rockland Trust Co. loan	$ 50,000
Morley Loan	25,000
Burmeister Loan	35,000
Total Loans	$110,000
(Less 5 months interest)	8,479
Net Funds Available	$101,521
Equipment	
Amvest	$ 86,500
Less 5 payments	9,447
Net Funds Available	$ 77,053
Existing Capital	
Cash in Checking Account	1,100
Total Available Funds	$179,674

(1) Bank Loan

72. The Rockland Trust Company has agreed to loan Hampshire $50,000 for a period of 56 months for the purpose of constructing and operating Hampshire's proposed station. Interest only will be due during the first six months of the loan. Fifty monthly payments of $1,000 principal plus accrued interest are to be made by Hampshire.[43] The loan is to draw interest at a rate 2% above prime and is to be secured by the personal endorsements of Perry and his wife.[44] (Hampshire Ex. 9, p. 22) Perry and his wife have agreed to secure the note as required by the bank. (Hampshire Ex. 9, p. 23) The Rockland Trust Company has had a continuing relationship with Perry and is aware of his financial condition. (TR 1793)

(2) Morley Loan

73. By letter, dated November 20, 1981, Robert Morley and his wife agreed to lend Hampshire $25,000, without collateral, over 31 months at a periodically adjusted rate two points above the prevailing Boston prime. During the first six-months after take-down of the loan, Hampshire must only make monthly payments of interest; thereafter, 25 successive monthly principal payments of $1,000 plus accrued interest.[45]

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[43] Based on 18½% interest rate, the monthly interest payments would be $770.83 or $3,854.17 for 5 months.

[44] The Perrys have also agreed to a second mortgage on their home if requested by the Bank as a result of a review of Perry's financial condition at the time of the loan. (TR 694; Hampshire Ex. 9, p. 23)

[45] Based on an initial loan of $25,000 at 18½ percent interest per annum, Hampshire will have to make payments of $385.42 per month for each of the first five months after take-down of the loan, a five-month total of $1,927.08. (Hampshire Ex. 9, pp 2-3, 22, 24A; TR 694)

74. To fund their commitment, Morley and his wife, in turn, rely on a $25,000 loan from Shawmut, Melrose-Wakefield Bank (Shawmut). By letter, dated November 18, 1981, Shawmut agreed to lend Morley $25,000 for one-year at two points above prime. During the one-year term of the loan, Shawmut will require Morley to make monthly payments of interest only but, thereafter, Morley must immediately repay the $25,000 loan. The Shawmut loan to Morley is contingent upon Morley furnishing adequate and satisfactory collateral to Shawmut. In its commitment letter to Morley, the bank wrote (Hampshire Ex. 9, p. 24; TR 694):

> "Collateral for such loan will be a pass book or/and stocks and bonds, which will be within required margin."

The bank has not defined its margin requirements. Vincent R. Puzzangara, the Shawmut Assistant Vice President who signed the commitment letter, explained (ABI Ex. 23, p. 10; TR 2654):

> "I am unable to presently describe in detail, the collateral required to provide funds to Morley. It is anticipated that Mr. Morley will provide collateral to the Bank for the Bank's review prior to the consummation of the loan. If the Bank determines that the collateral is unsatisfactory or inadequate, the Bank will require that Mr. Morley provide additional satisfactory collateral, prior to the issuance of funds"

Morley and his wife furnished their financial statement and their commitment to provide the required collateral. They will use personal funds to meet Shawmut's margin requirements. Morley is willing to convert personal assets into cash, if necessary, to satisfy the bank's margin requirements. (Hampshire Ex. 9, pp. 2, 24-26; TR 694, 1504, 1603-05, 1631)

75. The Morleys' financial statement (Hampshire Ex. 9, p. 26) and testimony establish current liquid assets of $49,485, as follows (TR 1597-1601):

Cash on hand and in banks	$11,542
Life Insurance Cash Value	4,314
Stocks, Bonds and Notes	16,555
U.S. Savings Bonds	1,716
Retirement Plan Cash Value	7,358
Draw against 1/3rd interest in Morley Realty Trust	7,000
Gold	1,000
Total	$49,485

76. The Morleys have curent liabilities of $6,992, as follows (TR 1602-03):

Real Estate Mortgage	$ 3,200
Bills and Taxes	3,722
Total	$ 6,922

(3) Burmeister Loan

77. By letter, dated prior to November 20, 1981, Mark Burmeister and his wife agreed to lend Hampshire $35,000, without collateral, over 41

months at a periodically adjusted rate two points above the prevailing Boston prime. During the first six-months after takedown of the loan, the Burmeisters will require Hampshire to make monthly payments of interest. Thereafter, 35 successive monthly principal payments of $1,000 plus accrued interest are to be made.[46] (Hampshire Ex. 9, p. 27; TR 694)

78. To meet their commitment to Hampshire, the Burmeisters rely on personal assets; a $9,050 credit line at Citibank; and the proceeds of a $25,000 bank loan.

79. Burmeister's balance sheet establishes that his current and liquid assets were, as of December 31, 1981, as follows (Hampshire Ex. 9, pp. 28-31; TR 1156-58, 1234-42):

Cash on Hand	$ 2,500
U.S. Savings Bonds	400
Cash Value of RCA Funds	24,000[47]
Net Credit from Citibank	9,050
1980 Corvette	15,000
Equity Residence (Second Mortgage)	25,000
Total	$75,950

80. The $25,000 asset listed, *supra*, represents a $25,000 loan. By letter dated November 20, 1981, Inter-Boro Savings and Loan Association (IBS) stated, with respect to the $25,000 loan, that Burmeister is (Hampshire Ex. 9, p. 32; TR 694):

> "... qualified and would be able to obtain that loan based on our standards. This letter, however, is not a commitment from us to grant you the loan at this time. When you are ready in the future, we will base our decision on the circumstances at that point."

IBS was silent as to the duration of the loan; the applicable interest rate; repayment terms; and whether any security or collateral will be required. (Hampshire Ex. 9, p. 32; TR 694, 1152-58, 1234-35, 1236-42)

81. Burmeister's current liabilities total $14,710, as follows (Hampshire Ex. 9, p. 28; TR 1237-45):

Accounts and Bills Due	$ 3,000
GMAC	3,700
United Jersey Bank	1,410
Home Mortgage	6,600
Total	$14,710

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[46] Based on an initial loan of $35,000 at 18½ percent interest rate per annum, Hampshire will have to make payments of $539.58 per month for each of the first five months after take-down of the loan, a five-month total $2,697.92.

[47] This amount has increased since Burmeister's testimony in this proceeding. Burmeister is an RCA employee and this asset results from an RCA plan for its employees. (TR 1154-57, 1234)

82. Burmeister's assets are approximately $251,000 and his liabilities $55,000[48], resulting in a net worth of $196,000. (Hampshire Ex. 9, p. 28)

(4) Equipment Financing

83. Hampshire proposes to rely on Amvest Leasing and Capital Corporation (Amvest) to provide it with equipment valued at $86,500. After payments, the deferred credit will provide $77,053 in deferred credit to Hampshire. (Hampshire Ex. 9, p. 7)

84. The Amvest letter, dated June 10, 1981, expressed its willingness to purchase equipment in order to lease it to Hampshire over an 84-month period for $1,889.35 per month. Amvest, which is not an equipment manufacturer or a bank, submitted the combined balance sheet, dated July 31, 1981, of Amvest Capital Company (Amvest Capital), an Amvest affiliate, and the consolidated balance sheet, dated July 31, 1981, of Amvest's parent, Amvest Corporation. (Hampshire Ex. 9, p. 21; Hampshire Ex. 15, pp. 4-6; TR 2386-97)

85. The combined balance sheet of Amvest and Amvest Capital set forth assets of $17,096,000, as follows:

Cash	$ 1,199,000
Net receivables from leases and fiance contracts	15,270,000
Other receivables[49]	584,000
Other assets	43,000
Total assets	$ 17,096,000

The combined balance sheet listed liabilities of $11,753,000, as follows:

Notes payable	$ 6,947,000
Accounts payable and accrued expenses	2,705,000
Advances from Amvest Corporation and consolidated subsidiaries	2,101,000
Total liabilities	$ 11,753,000

86. The consolidated balance sheet of Amvest Corporation listed $11,866,000 in current assets, as follows:

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[48] $42,000 of this amount is represented by a mortgage on the Burmeister home.

[49] No "aged" schedule of "receivables", certified by an accountant, identifying accounts collectible within 90 days was provided.

Cash and short-term investments[50]	$ 6,052,000
Accounts receivable[51]	4,921,000
Coal inventory	636,000
Prepaid expenses	257,000
Total current assets	$11,866,000

87. The consolidated balance sheet of Amvest Corporation listed current liabilities of $7,977,000, as follows:

Accounts payable	$4,377,000
Accrued expenses	1,248,000
Income taxes	1,016,000
Current maturities of long-term borrowings	1,336,000
Total current liabilities	$7,977,000

88. Alternatively, Hampshire submitted an equipment financing proposal from Radio Systems, Inc. (RSI). By letter, dated January 4, 1982, RSI agreed to purchase broadcast equipment totaling $86,500 and to lease the equipment to Hampshire over an 84-month period at a monthly rental of $1,899.35. RSI will purchase equipment manufactured by CCA, Moseley, Phelps/Dodge, Andrew, TFT, Thompson/CSF, Pi-Rod, Ampro, QRK, Broadcast Electronics and Marti and lease such equipment to Hampshire for a monthly rental.[52] (Hampshire Ex. 9, pp. 12-19; Hampshire Ex. 15, p. 7; TR 694, 2397)

(5) Financing of Attorney's Fees

89. Hampshire's principals have personally financed Hampshire's legal representation.[53] It is anticipated that additional attorney fees will approximate $22,000. (TR 1797-98) The funds to be made available to Hampshire as loans or equipment credit are contingent upon grant of its application. It is the intent of the partners to continue to fund Hampshire's legal fees personally in proportion to their ownership interest in Hampshire.[54] (TR 1130-34, 1159, 1516, 1522; 1800) The legal fee item is open ended in that the partners realize that it may go higher than anticipated; however, they intend to meet their commitment from current income and assets. (Hampshire Ex. 9, p. 5; TR 1224-25, 1513-16, 1632-34, 1795-1802)

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[50] The consolidated balance sheet did not segregate cash from short-term investments.

[51] An "aged" schedule of accounts receivable, identifying accounts which are collectible within 90 days, was not provided.

[52] Hampshire did not submit RSI's balance sheet and did not offer any evidence as to whether RSI has sufficient net current liquid assets to meet its commitment to Hampshire.

[53] Perry, Morley and Burmeister advanced the funds and, as a result, hold demand notes which are not to be repayed until Hampshire is profitable. (TR 694, 1605-09, 1616-20).

[54] The contributions are projected to be: Perry, $11,000 and Morley and Burmeister, each $5500. (TR 694)

V. Issue 7 - 47 CFR 1.65 - Hampshire's Failure to Report Corporate Dissolution

90. The Presiding Judge, in adding this issue, noted that it is undisputed that Hampshire, which had been incorporated under the general laws of the Commonwealth of Massachusetts in August 1973, was dissolved by the Supreme Judicial Court, Suffolk County on January 10, 1979. However, the dissolution of Hampshire was not disclosed to the Commission until Amherst raised the matter in a "Petition to Enlarge Issues," filed May 7, 1981. Thereafter, on July 6, 1981, Hampshire amended its application to reflect a "Revival Certificate" issued by the Secretary of State of the Commonwealth of Massachusetts on June 25, 1981, which revived the corporate status of Hampshire "for all purposes and without limitation of time with the same power, duties and obligations as if it had not been dissolved."[55] The Presiding Judge, based on these facts, added a Section 1.65 issue to determine why Hampshire did not timely report to the Commission its lack of corporate status.

(a) Morley Learns of Hampshire's Dissolution

91. Hampshire was incorporated by the Commonwealth of Massachusetts on August 15, 1973. In February 1981, Hampshire's communications counsel informed the principals of Hampshire that the Commission was preparing to designate this case for hearing. In view of the fact that Hampshire had been essentially dormant for a number of years, while its application in this proceeding was pending, Perry and Morley decided to check and update various aspects in connection with Hampshire's application. Morley had the responsibility to check with the Commonwealth of Massachusetts to ensure that everything was in order relative to the corporation. (TR 1314-15, 1643-46)

92. On February 25, 1981, Morley visited the Office of the Secretary of State for the State of Massachusetts. It was at this time that Morley first learned that Hampshire's corporate status had been dissolved as of January 10, 1979, for failure to pay franchise taxes for the years 1973-1978. Morley had not realized that an inactive corporation, without income, was required annually to pay a state tax. (Hampshire Ex. 8; TR 1214, 1332-34, 1645-46; 1670)

93. At the time Morley was informed that Hampshire had been dissolved, he hearned from a secretary in the Secretary's office, Miss Murray, that Hampshire could be revived. He was told by Miss Murray that such revival was simple and happened, routinely, all the time. In fact, the Commonwealth had printed instructions on the revival procedure. Miss Murray also told Morley that the corporation could be revived as if it

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[55] Hampshire's July 6, 1981, amendment was accepted by *Memorandum Opinion and Order* (FCC 81M-2291), released July 24, 1981.

had never been dissolved. (Hampshire Ex. 8, p. 2; TR 1340-41, 1363, 1565) Morley consulted with Hampshire's local attorney, John Connolly, about the corporate dissolution shortly after learning of it. He was told by counsel not to worry, that this is "inconsequential," something that often happened to Massachusett's corporations. (TR 1349-52) Morley, who was aware of the responsibility to report significant and material changes to the Commission believed that "the matter was entirely without decisional significance," and did not have to be reported. (TR 1353; Hampshire Ex. 2, pp. 2-4)

94. Morley viewed Hampshire's situation as merely a local state tax matter which would not have any negative impact on Hampshire's application. (TR 1353-54) It did not occur to him that Hampshire's dissolution was something in which either the Commission or Hampshire's communications counsel would be interested. (TR 1594, 1636-37)

(b) Perry Informed of Corporate Dissolution

95. A few days after speaking to local counsel, Morley informed Perry of Hampshire's dissolution.[56] He told Perry of his conversations with Murray and Connolly as to the method to revive the corporation and that they would have to pay back franchise taxes, interest, penalties and fees for filing annual reports for the years when such taxes and fees were not paid.[57] (TR 1361; 1366) Morley then told Perry he was going to do what was necessary to revive Hampshire. (TR 1367)

96. Perry explained that Hampshire's dissolution was not disclosed to the Commission because he believed the dissolution to be temporary and unimportant. He acknowledged that he was "concerned" about the dissolution. In the course of the case, whenever Perry had a question regarding compliance with the Commission's Rules, he consulted with Hampshire's communications counsel. However, despite his "concern" about the dissolution, Perry did not discuss the dissolution with Hampshire's counsel prior to the filing of Amherst's Petition to Enlarge Issues.

97. Perry explained that he did not report Hampshire's dissolution to Hamsphire's communications counsel because he believed, on the basis of Morley's assurances, that it was a minor matter of no significance which

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[56] Perry, the Hampshire principal primarily responsible for seeing to it that the application was kept up-to-date, had not previously known of Hampshire's dissolution. (TR 1321, 1327, 1730-31, 1845)

[57] Chapter 156B of the General Laws of the Commonwealth of Massachusetts requires a corporation organized for the purpose of carrying on business for profit in the Commonwealth to file an annual franchise tax return with the Commissioner of Revenue and an Annual Report with the Secretary of State. In the event of non-compliance for two consecutive years, the Secretary of State may apply to the Supreme Judicial Court for an order dissolving the corporation. Ninety days notice by mail must be given the corporation before a decree of Dissolution may issue.

was being taken care of and also because of a discussion he had with a communications attorney who did not represent Hampshire. In early March 1981, Perry met this communications attorney in Washington, D.C. Perry, in an informal discussion, asked this attorney in the form of a hypothetical question, whether an applicant would be dismissed by the Commission if the applicant corporation was dissolved. He was told that it was of no importance, that it was curable and that Perry should not worry about it. Perry did not ask this attorney if it was necessary to report this matter to the Commission. (TR 1309, 1494, 1575-78, 1593-95, 1685-92, 1699-1706, 1713-19, 1845-48)

(c) The March 27, 1981 Meeting of the Hampshire Principals

98. On March 27, 1981, Hampshire's principals, Morley, Perry and Burmeister met in a Boston restaurant. The purpose of the meeting was to decide whether they would go forward with their application. At this meeting, Morley reviewed with Perry and Burmeister what he had learned about the corporation's dissolution. The principals agreed that they would continue to prosecute the application and that Morley should go about getting the corporation revived with "dispatch."[58] (TR 1378-82, 1391-97, 1407, 1412, 1719, 1859)

99. As noted, *supra*, the Commission, on March 16, 1981, released its *Designation Order* in this case. The Hampshire principals held the March 27, 1981 meeting in order to evaluate Hampshire's overall posture. Morley acknowledged that they viewed it as a confidential business meeting and that they looked regularly over their shoulder to make sure nobody was there. Morley was concerned lest Amherst learn about Hampshire's dissolution, pending its corporate revival. Burmeister, Morley and Perry had to decide if they would prosecute the application. They realized that they would have to contribute individually to pay the back taxes and fees. As noted, *supra*, it was resolved that they would prosecute. (TR 1202, 1309, 1367-68, 1378-83, 1391-98, 1407-12)

(d) Morley's Activities re Corporate Revival

100. In order to revive Hampshire, it was necessary for Morley to obtain and prepare tax forms for the years in which Hampshire had not paid its taxes. Morley had requested the necessary forms from the state in late February and received them April 13, 1982. (Hampshire Ex. 8, p. 3, 7; TR 1417-18) In mid-May, he had completed preparing the forms and mailed the forms to the Secretary of State. (TR 1416-17) After a couple of

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[58] Burmeister did not recall attending this meeting. He recalled attending a meeting in April, 1981, when they reviewed what had to be done to get ready for the hearing. Burmeister explained that he first learned of the corporate dissolution shortly before the hearing in December, 1981 and that he had earlier understood it to be a tax problem. (TR 1180-85, 1193-94, 1202)

weeks passed in which he heard nothing on the corporate status of Hampshire, Morley called the Secretary of State's office and learned that the forms he had filed had apparently been lost. The tax office had been moved and his papers could not be located. (TR 1423-25)

101. As a result, Morley had to reconstruct the data on the tax forms because he had not kept copies of the forms he had filed. On June 16, 1981, Morley refiled the delinquent tax forms, this time in person. (TR 1427, 1429) He waited until the amount due was calculated and paid the bill immediately. (TR 430) On June 25, 1981, Morley filed the delinquent annual reports and Hampshire's corporate status was revived. (TR 1427, 1429, 1430-32, 1452)

(e) Morley's Representations re Reason For Non-Payment of Taxes

102. In an affidavit dated July 2, 1981, filed with the Commission as part of Hampshire's opposition to the petition to enlarge filed by Amherst, Morley represented that "further investigation revealed" that the reason Hampshire was dissolved was non-payment of franchise taxes "since the tax notices had been sent to an incorrect address." (ABI Ex. 11) According to Morley, he based this statement in his affidavit on information he had obtained from the post office where he was told that Hampshire no longer leased the post office box which was Hampshire's address of record. From this, Morley assumed that the reason for non-payment of taxes was that the tax notices had been sent to a wrong address. (TR 1571-73)

103. Perry acknowledged that he read Morley's affidavit and the accompanying pleading on July 6, 1981, prior to their being filed with the Commission. However, he explained that he had not reviewed them carefully because of personal pressure he was under at the time. His wife gave birth on that day and he had no sleep that night. At the time he read the documents he was preparing to return to the hospital and, consequently, he wanted to get the documents in the mail and off his mind. (TR 1851-53)

104. The evidence establishes that the reason that Hampshire had not paid its corporate franchise tax over the years was that Perry had thrown away the tax forms on the mistaken belief that because Hampshire was at the time dormant, no taxes had to be paid. Perry opened the first envelope containing tax forms sent to Hampshire by the State. After that he simply placed the unopened letters containing the tax forms in a box in which he kept materials relating to the Hampshire application. In 1979, when he redecorated his office, he threw the envelopes away without ever opening them. (TR 1736-38) Similarly, since Hampshire was not an operating company, he did not believe it was necessary to file annual reports. (TR 1753)

105. Initially, when Hampshire was formed, a post office box was rented in the corporation's name. After several years Hampshire failed to renew the box. (TR 1761-64) The tax forms had been sent to this post office box rather than to Perry directly. The mail to this post office box was regularly picked up and delivered to Perry's home. Perry acknowledged that the reason for the non-payment of taxes was that while he had received the tax forms for 1973-1979, he had discarded them. (TR 1740) According to Perry, he made an error in not making the fact that he had received some of the tax forms clear to Hampshire's counsel. (TR 1742)

VI. Issue 8 - Submission of Incorrect Map by Perry as Part of Hampshire Ex. 6

(a) Perry's Testimony - December 8 - 10, 1981

106. Hampshire, as part of its direct written case relative to whether its proposal complied with 47 CFR 73.315(a); namely whether its proposed 3.16 mV/m contour (70 dBu) encompasses all of Amherst, submitted Hampshire Ex. 6, entitled "Engineering Exhibit Regarding 70 dBu City Grade Coverage Issue." Perry was the sponsor of this exhibit. (Hampshire Ex. 6, p. 1) Perry, testifying as an engineering expert, represented in Exhibit 6 that (Hampshire Ex. 6, pp. 2-3):

> "Hampshire, for its part, has always attempted to specify transmitter sites which would maximize coverage not only to the town of Amherst but to all of Hampshire County as well. Indeed, Hampshire promised to specify this type of coverage in its 1973 Rulemaking Petition which prompted the Commission to add Channel 265A as a first FM assignment at Amherst. See Petition for Rulemaking included as Attachment B hereto. In that Rulemaking Petition we noted that the assignment could be especially efficient in the coverage of the major population centers in Hampshire County. We also showed that a properly placed transmitter site could provide 60 dBu service to at least 90% of the population of Hampshire County and pledged in our Rulemaking Petition to seek that kind of coverage if the channel were assigned as requested."

Hampshire Ex. 6 also stated that each of the three sites specified at various times in Hampshire's application had enabled Hampshire to cover 90% of the County population with a 60 dBu contour, as Hampshire had committed itself to do in its Rulemaking Petition. (Hampshire Ex. 6, pp. 2-3)

107. Although Hampshire Ex. 6, page 2, stated that the Petition for Rulemaking was included as Attachment B, no such document was, in fact, attached when Hampshire Ex. 6 was initially exchanged. However, during the November 25, 1981 prehearing conference, counsel for Amherst had informed the Presiding Judge and the parties that Hampshire Exhibit 6 was incomplete, in that it lacked the Petition For Rulemaking. (TR 105) Counsel for Hampshire acknowledged its omission and stated, "We will certainly take care of that problem. It was our

error." (TR 121) By "Erratum," filed November 30, 1981, counsel for Hampshire furnished the parties and the Presiding Judge with copies of the Petition For Rulemaking, which was "inadvertently omitted" as Attachment B to Hampshire Ex. 6.

108. A revised Hampshire Ex. 6 was furnished to counsel for the parties and the Presiding Judge during the December 8, 1981 hearing in this proceeding. (TR 449, 454-465) This revised exhibit did not contain a copy of the Petition For Rulemaking. On the morning of December 9, 1981 counsel for Hampshire had marked for identification and offered as pages 26 through 30 of Hampshire Ex. 6, a copy of the "Petition For Rulemaking," filed May 1, 1973 by Hampshire. (TR 616-618)

109. Perry, during examination by Amherst's counsel, on December 9, 1981, acknowledged that the Engineering Report referred to in the Petition for Rulemaking was not attached to that Petition as part of revised Hampshire Ex. 6. Perry explained that he hadn't been able to find a copy of the Engineering Report at the time he furnished the Petition to counsel for Amherst. He explained that he later found it and brought it to Washington, D.C. and had a copy with him. Hampshire counsel, in response to an inquiry by Amherst counsel as to whether the Engineering Report was going to be furnished, agreed to produce it and make it part of Hampshire Ex. 6. (TR 632-34) That afternoon Hampshire counsel exchanged copies of the "Engineering Report", identified and offered it as pages 31-39 of Hampshire Ex. 6. It was received in evidence. (TR 682-84) This "Engineering Report" contained a Figure 2 (Hampshire Ex. 6, p. 36), depicting the "potential 70 dBu" contour, showing less than complete coverage of Amherst, the "potential 60 dBu" contour, and a mark indicating the transmitter site for such contours.[59] (Hampshire Ex. 6, p. 36)

110. Counsel for Hampshire, on redirect, questioned Perry concerning Figure 2. (Hampshire Ex. 6, p. 36) Perry responded as follows (TR 936-37):

> "Q. Mr. Perry, let me draw your attention to page 36 of the Exhibit Number 6—Hampshire Exhibit Number 6. I notice that there is a figure 2 at the bottom of that page. Would you explain what that is, Mr. Perry?
>
> A. Let me find it. Yes, sir.
>
> Q. What is that, Mr. Perry?
>
> A. That is a map that we submitted to the Communications Commission as part of the request for assignment over a channel to Amherst.
>
> Q. Is the boundary, or are the boundaries of the town of Amherst depicted on this figure?

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[59] Page 5 of the Engineering Report, which listed the populations within the 70 and 60 dBu contours, reported that 26,300 of a total population of 26,331 people living in Amherst would receive a 70 dBu signal from an FM station situated as shown in Figure 2. (Hampshire Ex. 6, p. 35)

A. Yes, Sir.

Q. And is it true - tell me, Mr. Perry, whether the potential - the [70] dbu contour completely covers the town of Amherst, as depicted here?

A. No, it doesn't.

Q. What was being depicted on this figure, Mr. Perry?

A. That was the contour of an optimized site that, assuming equal terrain and an — a site essentially near the center of the allocation window. That would assume as average of 300 feet above average terrain with a site near the center of the allocation.

Q. And was this in the petition for rulemaking which was submitted to the Commission?

A. Yes, it was, Sir."

111. Earlier, during Perry's testimony on December 9, 1981, he had discovered that Figure 1, which depicted the limiting arcs relative to the allocation study locating a site, was not appended to the Engineering Report. The numbering on the bottom of the pages of the Engineering Report disclosed that page 3 was missing. (Hampshire Ex. 6, pp. 33-34) This Figure 1 was entitled "Figure 1-Amherst Allocation Study". A supporting affidavit was also discovered to have been missing. Perry believed that Figure 1 had been used in a subsequent document and located it in the hearing room. Upon reviewing it, Perry testified that the map he had found was identical to original Figure 1 submitted to the Commission with the Rulemaking Petition in 1973. Upon request by the Presiding Judge, Hampshire represented that it would locate the deleted affidavit and supply it to the Presiding Judge and the parties. (TR 745-750)

112. The next day, December 10, 1981, counsel for Hampshire advised the Presiding Judge and the parties that Perry was mistaken in his belief that the map he had located the day before was identical to the true Figure 1. Counsel stated that, "Shortly after the recess yesterday we located a copy of the real Figure 1, and we are supplying that. . . ." Hampshire also supplied an executed copy of the missing affidavit.[60] The "real Figure 1" and the missing affidavit were marked as Hampshire Ex. 6, pages 40 and 41, respectively.

(b) Hampshire's Proposed Findings of Fact and Conclusions of Law

113. In its "Proposed Findings of Fact and Conclusions of Law" (Hampshire Findings), dated October 5, 1982, Hampshire set forth the following finding of fact:

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[60] Perry "found or helped to find" copies of Figure 1 and the affidavit in "an old file" of his containing pleadings and other papers which he had given to Hampshire's attorneys "back before the case was designated for hearing." (Hampshire Ex. 1983-A, p. 2)

> "129. The potential for having some shortfall in providing full city-grade coverage to all of Amherst has been well known for some time. When Hampshire originally requested assignment of Channel 265A to Amherst it informed the Commission that there were potential problems associated with placing city-grade coverage over all of the Town of Amherst (Hampshire Ex. 6, p. 36, figure 2; Tr. 936-37). Apparently knowing of this problem, the Commission nevertheless decided to assign Channel 265A to Amherst (Hampshire Ex. 8, p. 7)."[61]

Perry actively assisted in the preparation of "Hampshire's Findings" and reviewed the proposed findings prepared by counsel prior to their filing with the Commission. (TR 2880-2899)

114. Amherst filed its "Petition To Enlarge Issues and Reopen The Record" on October 20, 1982, which resulted in the specification of the issue to determine all the facts and circumstances surrounding the submission of page 36 of Hampshire Exhibit 6 into evidence.

(c) Perry's Explanation re Submission of Incorrect Figure 2 (page 36, Hampshire Ex. 6)

115. Perry, in his direct written testimony relating to the city coverage issue, exchanged on November 21, 1981, referred to Hampshire's 1973 Rulemaking Petition seeking assignment of Channel 265A to Amherst. (Hampshire Ex. 6, p. 2) The reference was in support of the assertion that Hampshire had, from the very first, promised the Commission that Hampshire would attempt to achieve maximum coverage if the channel were assigned.

116. The Petition For Rulemaking had emphasized the importance of Amherst in Hampshire County and the paucity of other radio services available to Amherst. It made no reference to possible non-compliance with any of the Commission's Rules for FM assignments nor the possible need for waiver of any rule. The Petition for Rulemaking was void of any reference to coverage or non-coverage of Amherst with a 70 dBu contour. Rather, the Rulemaking Petition itself emphasized the potential for wide-area coverage which the new FM channel would make possible. (Hampshire Ex. 6, pp. 26-30; Hampshire Ex. 1983A-3)

117. Perry, as part of the November 21, 1981 exchange of direct testimony, supplied Hampshire's attorneys with a copy of the 1973 Petition For Rulemaking which he had prepared. (TR 2772, 2803, 2903) At that time, Perry had not found copies of the attachments, which were a demographic study of Amherst and the Engineering Report. (TR 632-33, 2803-07) Hampshire's attorneys asked him to provide copies of the attachments, along with other papers related to the case, when he came to

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[61] The reference to "Hampshire Ex. 6, p. 36, figure 2" is to Exchanged Figure 2; the reference to "Tr. 936-937" is to Perry's redirect testimony set out in para. 110, above; and the reference to "Hampshire Ex. 8, p. 7" was intended to be Hampshire Exhibit 18, p. 7, the Commission's *Order* assigning Channel 265A to Amherst.

the hearing in Washington. (TR 2818) Perry understood that he was to bring these papers to the hearing to have available in case someone wished to examine them. (TR 2796-97, 2818-19) He did not, at that time, think that Hampshire would affirmatively seek to introduce these papers, or that Hampshire would seek to prove anything by them.[62] (TR 2817, 2821-29, 2835-38, 2849-2850)

118. Perry went through boxes of loose papers relating to this case which he kept in his office in the cellar of his home in Duxbury, Massachusetts. (TR 2815-26) He did this on the night of December 6, 1981, before leaving the next day, December 7, 1981, to come to Washington for the commencement of the hearing. (Hampshire Ex. 1983-A, p. 1; TR 2778-81) He expected to find the attachments in question and other old papers related to the case. (TR 2779-81) There had been a snow storm that day and the power had gone off in the Perry home. Before leaving, Perry went through the boxes in his dark basement office, using a small flashlight, and found, among other things, the unattached, loose pages of the original master of the Engineering Report that had been one of the attachments to the 1973 Rulemaking Petition. (TR 2779-83)

119. When he came to Washington the next day, Perry brought with him the papers he had thus assembled. He removed them from his suitcase and placed them in a bureau drawer in his hotel room. (Hampshire Ex. 1983-A, p. 1; TR 2778-81)

120. On Tuesday, December 8, during an off-the-record, informal discussion with someone other than Hampshire's counsel, Perry was asked if he could supply a copy of the Engineering Report[63] which had been an attachment to the 1973 Rulemaking Petition. (TR 2835-38, 2850) Perry, on the evening of December 8, 1981, went through the papers he had brought down, which he had placed in the drawer in his hotel room,

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[62] It was only after the Engineering Report was in evidence that Hampshire counsel suggested that Figure 2 showed the Commission, as early as 1973, that it wouldn't serve all of Amherst with a 70 dBu signal from an "optimized site." (TR 2864-65)

[63] This Engineering Report stated that the assignment meets all the "applicable engineering standards" of the Commission and went on to state that (Hampshire Ex. 6, pp. 33-34): "For reference purposes, a transmitter site near the Amherst-Hadley Town line in the area between Routes 9 and 116 has been assumed. In practice, it may prove desirable to locate the transmitter somewhere else depending on the outcome of terrain studies of the area. From a practical standpoint, however, we foresee no problems in finding a good site in the relatively large area available. Figure 2 shows the area which could be served by a Class A FM station with its transmitter located at the site affording the maximum possible coverage of population centers in Hampshire County while still observing the limiting arcs shown in Figure 1. The site shown in Figure 2 is not the reference point upon which the allocation study is based but represents rather a potential transmitter site which would permit service to substantially all of the population of Hampshire County."

and picked out what he believed to be the master of the Engineering Report. (TR 2781-82)

121. He found an incomplete "master"[64] of the "Engineering Report," the pages of which were in the following sequence:

— "Master" Pasted-up cover page;

— "Master" typewritten first textual page with no page number;

— "Master" typewritten textual page marked "-2-" at bottom;

— "Master" typewritten textual page marked "-4-" at bottom;

— "Master" typewritten chart marked "-5-" at bottom;

— "Master" typewritten textual page marked "-7-" at bottom;

— "Master" typewritten textual page marked "-8-" at bottom; and

— "Master" typewritten textual page marked "-9-" at bottom.

Perry explained that he found a "photocopy" of Figure 2, (Hampshire Ex. 6, p. 36; Hampshire Ex. 1983-A2), marked "-6-" at the bottom, separated and apart from the "master". (Hampshire Ex. 1983-A1) This "photocopy" was not an original typewritten and pasted-up "master." (TR 2781-93) However, based on his brief examination, he concluded that this Figure 2 belonged to the Engineering Report. (TR 2781-88, 2794-95, 2917-18)[65]

122. As noted, *supra,* on the morning of the following day, December 9, 1981, counsel for Amherst, examined Perry on *voire dire* with respect to his written direct testimony, and questioned him about the 1973 Engineering Report which, along with the demographic study, was referred to in the Petition for Rulemaking that had been attached as an exhibit to Perry's written direct testimony. (TR 632, 2843) Perry answered that he found the Engineering Report subsequent to the preparation of his direct testimony, and that it was available. (TR 632-33) Counsel for Hampshire stated that a copy of the Engineering Report would be supplied. (TR 633)

123. That afternoon, after the luncheon recess, copies of the 1973 Engineering Report were distributed to the parties and the Presiding Judge by Hampshire counsel.[66] The Engineering Report was received in evidence as pages 31-39 of Hampshire's Exhibit 6. (TR 682-84, 2841) While testifying about these pages Perry noticed, for the first time, that Figure 1, an allocation study referred to in the Engineering Report, was missing.

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[64] A "master" is the original document from which duplicate copies are made. It contains the original typewritten textual material in addition to maps and graphics which are glued, or pasted, on to the pages. (TR 2782-83)

[65] Perry did not at this time check page numbers of the Engineering Report to be sure that he had all the pages. (TR 2791-92)

[66] Prior to attending the December 9, 1981 hearing session, Perry met with Hampshire's counsel at their office, and provided counsel with a copy of the "Engineering Report" which Perry had reconstructed in his hotel room the night before. (TR 2800, 2837, 2850)

He called this to the attention of everyone in the hearing room. (TR 740, 2788, 2840-44, 2859-60, 2911) Hampshire then undertook to find, and that evening after the recess did find, a copy of Figure 1, as well as a copy of an engineering affidavit that also had accompanied the 1973 Rulemaking Petition. (Hampshire Ex. 1983-A, p. 2) As detailed, *supra,* these were supplied for the record the next day as pages 40 and 41, respectively, of Hampshire Ex. 6. (TR 918-24)

124. It was not until after Amherst's counsel had examined Perry on *voire dire* about the Engineering Report that it occurred to counsel for Hampshire that the Engineering Report provided additional support for Hampshire's case. (TR 632, 2843) Hampshire's counsel, at that time, noticed, and discussed with Perry, that Figure 2 of the Engineering Report (page 36 of Hampshire Ex. 6) was a coverage map which showed that, assuming flat terrain and use of an "optimized site" of the kind Hampshire promised to use, there would be a potential problem covering the far northeast corner of the Town of Amherst with a 70 dBu signal. (Hampshire Ex. 6, p. 36; TR 2807-09, 2835-36, 2862-63, 2865, 2881) Perry explained that at the time this aspect of Hampshire's Ex. 6, p. 36 (Figure 2) was discussed in December 1981, and at all times prior to learning of Amherst's filing of its October 1983 Petition to Enlarge Issues, he had no knowledge or suspicion that there was any discrepancy between the Figure 2 submitted on December 9, 1981, as Hampshire Ex. 6, p. 36, and the Figure 2 in Hampshire's Engineering Report, as filed with the Commission in 1973, as part of the Petition for Ruling.[67] (Hampshire Ex. 1983-A, p. 3; TR 2924)

125. Perry explained that when he saw the Figure 2 which accompanied Amherst's "Petition To Enlarge Issues" he realized that he had made a mistake, and that Figure 2 as filed in 1973 was different from the Figure 2 submitted as Hampshire Exhibit 6, p. 36. (Hampshire Ex. 1983-A, p. 3) Perry further explained that he examined copies of the two figures and saw that they were copies of the same document, made before and after additional information had been added. (Hampshire Ex. 1983-A, p. 3) It was then, according to Perry, that he recalled, for the first time, that when he prepared the 1973 filing, he had added certain information to Figure 2 after receiving it back from the printer the first time. (Hampshire Ex. 1983-A, p. 3) Perry realized then that in December 1981, when he had put together what he believed to be a copy of the 1973 Engineering Report, he had incorrectly used a copy of Figure 2 from the first printing of the Engineering Report, rather than a copy of Figure 2 filed as part of the Engineering Report. (Hampshire Ex. 1983-A, pp. 3-4)

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[67] Morley and Burmeister, the other Hampshire principals, played no part in the submission of Figure 2 in 1973 or at the hearing in December 1981. (TR 2941-44, 2945-60)

126. The Figure 2 filed as part of the "Engineering Report" (Figure 2) was a map showing:

(1) a "reference site" slightly to the west of the western boundary of the Town of Amherst together with a short arc of the 70 dBu contour of an operation using such "reference site," demonstrating ample clearance of the whole Town of Amherst (Hampshire Ex. 1983A-3);

(2) potential 70 and 60 dBu contours of an operation using a site which was designated "optimized site" and which was located about 8-10 miles southwest of the "reference site". This "optimized" 70 dBu contour failed to cover the northeast corner of Amherst (Hampshire Ex. 1983-A-3).

127. The Figure 2 Perry produced in December 1981 differed from the Figure 2 submitted as part of the Petition For Rulemaking in that it omitted all information regarding (1) a "reference site"; (2) the corresponding arc of the 70 dBu contour showing coverage of the entire town of Amherst from a reference site; and (3) the designated "optimized site." (Hampshire Ex. 1983A-2 and A3, p. 6)

128. While regretting his mistaken identification of Hampshire Exhibit 6, p. 36, as Figure 2 from Hampshire's 1973 Engineering Report, Perry emphasized that he would have testified exactly as he did at the December 1981 hearing regarding Figure 2 if he had included in Hampshire Ex. 6 the version of Figure 2 actually filed with the Commission back in 1973. He explained that the Figure 2 filed with the Commission in 1973, and the earlier version thereof mistakenly submitted in December 1981 as page 36 of Hampshire Exhibit 6, both show that from an "optimized site" complete coverage of the Town of Amherst might not be achieved. (TR 2914-15) Perry further explained that paragraph 129 of the Proposed Findings of Fact and Conclusions of Law filed by Hampshire continues to be correct when considering Figure 2 as filed with the Engineering Report. Perry noted that page 5 of the Engineering Report disclosed that all of Amherst would not be served from the "optimized site." (Hampshire Ex. 1983A-1, p. 5; TR 2914)

VII. Issue 4 - The Comparative Issue

(a) Integration

(1) Hampshire County Broadcasting Co., Inc. (Hampshire)

129. Hampshire's officers, directors and stockholders are:

Edward F. Perry, Jr. — Vice President, Director and 50% stockholder;

Robert A. Morley — President, Treasurer, Director and 25% stockholder;

Mark H. Burmeister — Director and 25% stockholder;

Jeffrey Brown — Clerk and Director

130. *Robert A. Morley* proposes to work full time as General Manager of Hampshire's FM radio station. (Hampshire Ex. 5, p. 1; TR 1468-69) Morley proposes to work 50-60 hours per week during the initial phases of the radio station's organization and operation. (TR 1474). Thereafter, he will devote a minimum of 40 hours weekly to the station. He will oversee programming; sales and business; engineering; and public service activities. (Hampshire Ex. 5, p. 1; TR 1468-69) If Hampshire is granted a license for its proposed FM station, Morley plans to reduce his non-broadcast business commitments in order to give himself sufficient time to establish and run the radio station. (Hampshire Ex. 5, p. 1; TR 1474)

131. Morley is 49 years old. He lives with his wife and two teenage children in Wakefield, Massachusetts, a community located in Southeastern Massachusetts, approximately one hour forty-five minutes driving time from Amherst. Morley owns no property in Amherst and there is no evidence that Morley ever has resided in Amherst. (Hampshire Ex. 5; TR 1302, 1476, 1482)

132. Morley is employed on a full-time basis as a partner and Operations Manager of the Morley Realty Trust (Realty Trust), a family business, in Wakefield. As Operations Manager of the Realty Trust, Morley presently spends in excess of forty hours weekly in managing ten apartment buildings. (Hampshire Ex. 5; TR 1302, 1469, 1474)

133. Morley, who has no broadcast experience, proposes to limit the time he will devote to the Realty Trust in Wakefield to 15-20 hours a week. Morley anticipates spending an additional 4-5 hours weekly as President of Hampshire. (Hampshire Ex. 5; TR 1302, 1457, 1470, 1474-75, 1491-92)

134. Morley does not intend to move his family to Amherst in the event of a grant. He plans to set up a secondary residence in Amherst to "minimize commuting time" between his family and realty business in Wakefield and his duties at the Amherst FM station. His plans for acquiring and maintaining a secondary residence in Amherst have not been finalized. (Hampshire Ex. 5; TR 1302, 1475-77, 1483-84)

135. Morley is prepared to hold the General Manager's position for a period of five to seven years, during which time he would commute between his home, family and business in Wakefield and his station duties and secondary residence in Amherst. (TR 1475-77, 1482-84)

136. Morley worked as a project engineer for RCA Corporation where, together with Mark Burmeister, he was awarded RCA's highest engineering award. (TR 1632) He was Engineering Manager of Thompson General Corporation. (Hampshire Ex. 5, pp. 1-2) As noted, *supra,* he also has business experience as partner and Operations Manager of the Realty Trust. (Hampshire Ex. 5, p. 1)

137. Morley was first proposed as an integrated principal on April 26, 1979. Hampshire's application was amended on that date to reflect that:

> "Hampshire presently plans to retain the services of Robert Morley . . . to work at the station full time."

It was not stated in what position Morley would serve. (TR 1488)

138. Hampshire's "Answers to Interrogatories," filed June 16, 1981, first disclosed Morley's intention to serve as full-time General Manager of Hampshire's proposed station, if a grant is received. Morley's intention to assume the General Manager's position "evolved" over a period of years. His appointment as General Manager was "firmed up" at a meeting of the Hampshire Board of Directors on March 27, 1981.[68]

139. *Edward Perry,* Vice President and 50 percent stockholder of Hampshire, will, if Hampshire is issued a construction permit, work a minimum of eight hours per week with engineering and public affairs responsibilities. Perry has had an interest in establishing a radio station in Amherst since 1960 when he was a student at Amherst and was an announcer for the school's FM radio station.[69] (Hampshire Ex. 3, p. 1)

(2) Amherst Broadcasting, Inc. (Amherst)

140. Amherst officers, directors and stockholders are:

Edward H. Peene, Jr.	—	President, Director and 50% stockholder
Robert K. McConnell	—	Treasurer, Director and 50% stockholder
Jean L. McConnell		Director
Carol J. Peene	—	Clerk

Only Edward H. Peene will participate on a day-to-day basis in station operation. (ABI Exs. 3, 5; TR 1894, 1899)

141. *Edward H. Peene* (Peene) has been an Amherst resident for 19 years. He has served on the Adult Education Advisory Board of Amherst, been a Director of the Chamber of Commerce, an incorporator of the Amherst Savings Bank and a member of the University Building Committee. He currently is a guest lecturer in Amherst at Hampshire College and the Stockbridge School of the University of Massachusetts. He lectures several times a year on radio and its role as a community servant and on a small-market broadcaster's perspective of regulatory obligations. (ABI Ex. 4; TR 1898)

142. Peene served as Sales Manager and Program Director of Station WERI, Westerly, Rhode Island. He occupied that position for three years

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[68] David Reid, the 12.5% shareholder originally proposed by Hampshire as General Manager, sold his stock interest in the company to Perry on March 9, 1981. (TR 1455-61, 1485-90) Morley, Perry and Burmeister had agreed in 1979 that Morley would be the General Manager. (TR 1489-90)

[69] Mark H. Burmeister, the other 25% Hampshire stockholder, will not participate in the operation of the station. (Hampshire Ex. 4, TR 1100)

(1959-62). His duties entailed responsibility for the sales program of the station, and supervision, planning and production of the station's programming. (ABI Ex. 4)

143. Peene joined the staff of Station WTTT, Amherst, Massachusetts as Sales Manager in 1963 when the station commenced operation under the ownership of College Radio. In 1966, he and Robert K. McConnell, as equal participants, formed Amherst and purchased Station WTTT from its former owner. At that time, Peene became President and General Manager of the station. (ABI Ex. 4)

144. As President and General Manager of Station WTTT, Peene has had experience in every aspect of station operation. He has responsibility for overall operation, including the format of the station, and hiring and maintaining a staff geared to execution of that format. He oversees the station's department heads and has ultimate responsibility over day-to-day programming, sales, and the technical operation of the station. Peene purchases equipment, negotiates with suppliers generally, and handles the station's governmental and civic relations, including liaison with Station WTTT's professional advisers, specifically its communications counsel. (ABI Ex. 4)

145. Peene is General Manager of Station WTTT(AM) and has been "on the air" as Station WTTT's morning man or newsman from 6:00 a.m. - 9:00 a.m., on weekday mornings, for the past 18 years. He will maintain his current Station WTTT responsibilities.[70] (TR 2136) He presently spends 20 hours per week at Station WTTT. (TR 2128)

146. Since 1976, Peene has been the owner and general manager of Chequers Restaurant in Amherst. In that capacity, together with four assistants, he supervises the overall operation of the restaurant. Peene's time is currently split between his duties at Station WTTT (approximately 20-25 hours a week) and his supervision of the restaurant (as much as 40 hours or more per week). His current work schedule is approximately 16 hours a day, seven days a week. He leaves his house at 4:30 a.m. to do his radio show each morning and he is never home before 8:00 p.m. Peene has trained his managerial assistants at the restaurant so that he can operate the restaurant "from a distance." (ABI Ex. 4; TR 1898, 2134-40)

147. As noted, *supra,* Peene will serve as General Manager of Amherst's proposed FM station. Upon receipt of a grant, Peene proposes to reduce his time allocated to the restaurant to approximately 10 hours a week in order to free himself to devote time to the construction and operation of the FM station, whose studios are to be co-located with Station WTTT. Peene proposes to devote 60 hours a week to purchasing equipment, assuring its prompt delivery, superintending construction,

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[70] Since 1963 Peene has also been the play-by-play announcer for the University of Massachusetts football games.

hiring a staff, programming the station, and publicizing it to its potential listeners, so that the service of the FM station is brought to the area within six months of receipt of a final grant. (ABI Exs. 3 and 5; TR 1894, 1899, 2138)

148. In the early months of the operation of the FM station, Peene will devote 60 hours a week to its operation. Thereafter, and on a continuing basis, Peene will devote a full 40-hour week to the FM station. He will have ongoing responsibility for superintending the station's staff, developing program formats, selecting music and supervising public affairs programming. (ABI Ex. 5; TR 1899)

(b) Diversification of Media

(1) Hampshire

149. Hampshire neither owns nor operates any mass communications medium.

150. Mark H. Burmeister, a director and 25 percent shareholder of Hampshire, does not, and has not, owned any interest in a radio or television broadcasting station, cable television system, newspaper or magazine. (Hampshire Ex. 4, p. 1)

151. Robert A. Morley, President, Treasurer, director and 25 percent shareholder of Hampshire, does not, and has not, owned any interest in an FCC licensed broadcasting station, cable television system, newspaper or magazine. (Hampshire Ex. 5, p. 1)

152. Edward F. Perry is affiliated with the following broadcast interests:

> Vice President, Director and 70% stockholder of Tolland County Broadcasting, Inc., permittee of standard broadcast Station WRTT, Vernon, Connecticut, located approximately 38 miles south of Amherst;
>
> President, Director and 75% stockholder of Lakeview Broadcasting Company, Inc., permittee of standard broadcast Station WGFP, Webster, Massachusetts, located approximately 40 miles southeast of Amherst;
>
> President, Director and 80% stockholder of Marshfield Broadcasting Company, Inc., licensee of Station WATD-FM Marshfield, Massachusetts, located approximately 100 miles east of Amherst;
>
> Director of Duxbury Community Radio, Inc., permittee of non-commercial Station WDBY-FM, Duxbury, Massachusetts, located approximately 100 miles east of Amherst;[71]
>
> Holder of an option to purchase a 32% ownership interest in Radio Ridgefield, Inc., permittee of Station WVFR, Ridgefield, Connecticut, located approximately 90 miles southeast of Amherst;

There is no other local station in any of these cities. (Hampshire Ex. 3; TR 560, 1463-66, 1817-18, 1824, 1827-29)

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[71] The license for Station WDBY has been assigned to the Duxbury Public School System. (*Order* (FCC 82M-4106), released December 28, 1982)

153. No broadcast company in which Perry has any ownership interest serves Amherst, Massachusetts or any area proposed to be served by Hampshire. (ABI Ex. 8)

(2) Amherst[72]

154. Amherst has no broadcast or media interests other than its ownership and operation of Station WTTT, Amherst, a daytime only standard broadcast station. Station WTTT's broadcast day averages 12 hours, ending no later than 7:00 p.m. (ABI Exs. 4 and 7; TR 1899-1903)

155. There are a minimum of six and a minimum of thirteen signals of other radio stations serving both Station WTTT-AM and Amherst's proposed FM coverage areas. Among these stations are three AM/FM combinations: Station WHYN/WHYN-FM, Springfield; Station WMAS/WMAS-FM, Springfield and Station WHMP/WHMP-FM, Northampton. The town of Amherst is the community of license of three full-time, non-commercial stations: Station WMUA-FM and Station WFCR-FM, both licensed to the University of Massachusetts at Amherst and Station WAMH, licensed to the Trustees of Amherst College.[73] (ABI Ex. 8, pp. 2-6; TR 242)

(c) Comparative Coverage

156. Each applicant seeks a permit to construct an FM Broadcast station on Channel 265 (100.9 MHz) and operate with an ERP of 3kW utilizing an antenna which will radiate in both the horizontal and vertical planes. Hampshire proposes to operate with an antenna whose center of radiation above average terrain (HAAT) is 300 feet. Amherst proposes to operate with an antenna whose center of radiation HAAT is 105 feet.

157. Since the applicants propose different HAAT's and different sites, there are differences in the location and size of their primary service (1.0 mV/m) contours. The areas and populations involved are tabulated below (Hampshire Ex. 2, pp. 6, 7):

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[72] Program duplication is discussed, *infra.*

[73] The town of Amherst and immediate environs is the home of the University of Massachusetts, Amherst College, and Hampshire College.

Applicant	*Primary Service*[74] *Area (sq. mi.)*	 *Population*
Hampshire	770	483.076
Amherst	368	165.935[75]
Hampshire advantage	402 (109.2%)	317,141

158. As noted, *supra*, Amherst Broadcasting, Inc. is the licensee of daytime broadcast Station WTTT, Amherst, Massachusetts. (ABI Ex. 8, pp. 2-4)

159. There are five or more primary aural broadcast services available to Hampshire's and Amherst's proposed primary service areas during the day and at night. (ABI Ex. 8; Hampshire Ex. 2, pp. 3, 6)

(d) Auxiliary Power

160. Hampshire proposes to install emergency power generators, while Amherst does not. (Hampshire Ex. 9, p. 4, incorporating by reference Hampshire's August, 1981 Amendment, Ex. 1, p. 1)

(e) Efficient Use of Broadcast Facilities

(1) AM Station WTTT's Hours of Operation

161. The authorized operating hours of Station WTTT(AM) are:[76]

January	7:15 a.m. to 4:45 p.m.
February	6:45 a.m. to 5:15 p.m.
March	6:00 a.m. to 6:00 p.m.
April	5:15 a.m. to 6:30 p.m.
May	4:30 a.m. to 7:00 p.m.
June	4:15 a.m. to 7:30 p.m.
July	4:30 a.m. to 7:30 p.m.
August	5:00 a.m. to 7:00 p.m.
September	5:30 a.m. to 6:00 p.m.
October	6:00 a.m. to 5:15 p.m.
November	6:45 a.m. to 4:30 p.m.
December	7:15 a.m. to 4:15 p.m.

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[74] Amherst's primary service contour was based on The National Bureau of Standards publication, Technical Note 101 and Figure 1 of Section 73.333 of the Rules. Hampshire's Primary Service contour was based on terrain limitation and Figure 1 of Section 73.333 of the Rules. The populations within the 1 mV/m contours were based on the preliminary 1980 U.S. Census. Uniform distribution of population was assumed where only a portion of a minor civil division as involved. (Hampshire Ex. 2)

[75] ABI Ex. 1, as amended, indicates that Amherst's primary service area will encompass 298.4 square miles. Hampshire's Rebuttal Ex. 1 lists 303.7 square miles. It is apparent that Amherst will serve less than 165,935 people with a primary signal. However, the record is silent as to what the figure would be.

[76] All times are Eastern Standard time and do not reflect the additional evening hour that Amherst is authorized to operate during the summer months due to Daylight Savings Time (DST). (TR 2667)

162. As noted, *supra,* Station WTTT(AM) is authorized to operate from 6:00 a.m. to sunrise with 500 watts. (TR 2667)

163. Amherst has failed to utilize its existing standard broadcast facility to the extent permitted by the Commission. Amherst's standard broadcast Station WTTT is authorized to operate during June and July until 8:30 p.m.; May and August until 8:00 p.m. Daylight Savings Time.

(2) Hours of Operation of The Proposed FM Station

164. Hampshire proposes to operate its proposed FM Station 24 hours a day (168 hours per week). Amherst proposes to operate 18 hours a day (126 hours a week).

(3) Duplication of Programming

165. Hampshire's proposal does not involve any duplication of programming.

166. At the time this proceeding was designated for hearing, Amherst proposed to duplicate twelve hours daily of the programming of Amherst's standard radio Station WTTT (*Designation Order*). Amherst's duplication of programming (74 hours) represented 66.66% of its proposed FM station's broadcast week (12 hours).

167. The Commission, in its *Designation Order*, specifically noted that Section 73.242(c) of the Rules, 47 CFR 73.242(c), prohibits an FM station licensed to a community of over 25,000 population[77] from devoting more than 25% of its average program week to duplicated programming. Among the issues designated by the Commission was an issue (issue 3) to determine whether Amherst's proposal to duplicate programming is violative of 47 CFR 73.242(c) and, if so, whether circumstances warranted waiver of the cited rules.

168. On April 29, 1981 Amherst filed an amendment, as a matter of right, pursuant to Section 73.3522(b)(2) of the Rules, 47 CFR 73.3522(b)(2), to report that Amherst had totally eliminated its duplicated programming proposal. During the May 18, 1981 prehearing conference in this proceeding the question was raised whether an applicant should be allowed to obtain a comparative advantage or eliminate a comparative disadvantage, subsequent to designation by the filing of an amendment, as of right, pursuant to 47 CFR 73.3522(b)(2); to meet a possibly disqualifying issue. This question was answered in the negative.

169. The Presiding Judge noted that the Commission, in revising its processing of broadcast applications[78], made clear that the sole purpose of permitting applicants to amend after designation, as a matter of right, is to permit them to meet those issues which would otherwise require the

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[77] The population of Amherst is 26,300, according to the 1970 U.S. Census Report.

[78] *Revised Processing of Broadcast Applications,* 72 FCC 2d 202 (1979).

disqualification of the applicant. The Presiding Judge ruled that there was no intent by the Commission to permit applicants to amend, as a matter of right, to improve or enhance their comparative position and, as a result, in the absence of a disqualifying issue Amherst would not be permitted to amend its application to eliminate programming duplication.[79] It was ruled that Amherst's amendment eliminating its program duplication proposal was accepted for the sole purpose of meeting issue 3, namely the question of violation of Section 73.242(c) of the Rules. It was further ruled that, under the particular facts of this case, it was appropriate to indulge in a legal fiction in order to insure that Amherst gained no comparative advantage by eliminating the proposed program duplication. *Nuance Corporation*, 85 FCC 2d at 418.

170. Pursuant to the *Designation Order*, Amherst was required to address, under the standard comparative issue, the effect of its former program duplication proposal, (para. 5), " . . . limited to evidence concerning the benefits to be derived from the proposed duplication which would offset its inefficiency. . . ."

171. Amherst noted that throughout its broadcast day, Station WTTT broadcasts in the monaural mode and that its proposed FM station will broadcast in stereo. It further noted that Amherst's proposed FM station would simulcast a live program in which Peene, from 6:00 a.m. to 9:00 a.m., broadcasts information about Amherst area activities, weather conditions, news, emergency weather reports, school closings and other topical information.[80] (ABI Ex. 7; TR 1092-03)

VIII. Issue 9 - Whether Hampshire Maintained Its Local File, As Required by 47 CFR 73.3526(a)

(a) Perry's Responsibility For Maintaining The Public File

172. On September 10, 1974, Hampshire County Broadcasting Company, Inc. (Hampshire) filed its application with the Commission. At the time, Section 1.526(a) (now Section 73.3526(a)) of the Commission's Rules required an applicant for a commercial broadcast station to maintain a public file at an accessible place in the proposed community of license. Edward F. Perry, Jr. (Perry) undertook the sole responsibility of establishing and maintaining the Hampshire public file. (TR 2966-67, 3183, 3224, 3315-16) Perry never delegated his overall responsibility. (TR 3229-31)

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[79] The Presiding Judge noted that had Amherst originally proposed 25% duplication, which is not prohibited by Section 73.342(c) of the Rules, it would not have been permitted to amend to eliminate its duplicated programming proposal. *Gray-Schwartz Broadcasting*, 44 RR 2d 1033 (1978); *Nuance Corporation*, 85 FCC 2d 412, 414 (Rev. Bd. 1981)

[80] As noted, *supra*, Station WTTT serves all of the area proposed to be served by Amherst's proposed FM station. (TR 2665-66)

(b) Perry's Awareness Of The Commission's Requirements Re The Public File

173. The Hampshire public file was established on September 10, 1974 at the law offices of Brown and Posner, South Pleasant Street, Amherst.[81] At that time, Perry was aware of the importance of the maintenance of the file in the Commission's regulation of the broadcast industry. (TR 3022, 3295) He realized that the public file was there for the convenience of the public "who might want to know about what's going on with the proposed radio station in the community", and that it was to be available to people who did not, "for one reason or another," have access to the files of the Commission in Washington or who didn't wish to go to Washington "to look in the Public Records Room." (TR 3027)

174. In February 1978, Hampshire filed a Petition to Deny (1978 Petition) (ABI Ex. 38; TR 3296), in which Hampshire sought denial of the license renewal of Amherst's Station WTTT, Amherst. The 1978 Petition, prepared and signed by Perry, sought disqualification of Amherst on a number of grounds, including misrepresentation, concealment of short spacing, and failure to ascertain community needs. Hampshire alleged that Amherst had failed to maintain a complete public file. (ABI Ex. 38, TR 3296)

175. Amherst had opposed the 1978 Petition, observing, in part, that inadequacies in Station WTTT's public file probably resulted from the removal of material by local college students. (ABI Ex. 39, p. 4; TR 3297) In *Amherst Broadcasting, Inc.*, ___ FCC 2d ___; 46 RR 2d 497 (1979), the Commission held that Hampshire had no standing to file the 1978 Petition and, in addition, rejected it on the merits. However, the Commission observed (ABI Ex. 40, p. 2; TR 3297):

> "... we view with concern licensee's non-compliance with our public access rules. We expect full compliance with our rules in the future and we will hold this licensee to its representation of periodically checking and replenishing the public reference file. See Mult-Com, Inc., 45 RR 2d 1243 (1979)."

176. Subsequent to designation of the Hampshire and Amherst applications for hearing, Amherst filed a "Petition to Enlarge Issues," dated May 7, 1981, which, *inter alia,* sought a public file issue against Hampshire on the ground that the Hampshire file was incomplete. (TR 3108-09) To aid in Hampshire's preparation of an opposition, Perry personally visited Amherst and reviewed Hampshire's public file. (TR 3108-09, 3172) By *Memorandum Opinion and Order* (FCC 81M-2951), released September 17, 1981, the Presiding Judge denied the issue

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[81] The responsibility of the law firm has been to receive papers sent for inclusion in the public file, to insert them in binders, and to make them available for inspection to the public, on request. (TR 2967)

request. This action, however, redirected Perry's attention to the importance of maintaining a complete public file. (TR 3187-91)

(c) *Efforts to Maintain The Hampshire Public File - September 1974 to March 16, 1981*

177. Perry established the Hampshire public file by hand-delivering a copy of the Hampshire application to Bruce Brown (Brown), Hampshire's corporate Clerk and a lawyer with the firm of Brown and Posner, Amherst. (TR 3023-25) Perry told Brown that the file was to be made available to members of the public. (TR 3023-27, 3042) Perry informed Brown that, from time to time, Hampshire would deliver additions for inclusion. (TR 3023-24, 3027-29, 3042-43) During the period September 1974 and March 16, 1981, the release date of the designation order, the following 20 items, consisting exclusively of amendments, except for an October 1, 1974 "Certification of Publication," were filed with the Commission and placed in Hampshire's public file (TR 3010-14):

(i) Amendment, dated September 26, 1974;

(ii) Amendment, dated September 30, 1974;

(iii) Certificate of Publication, dated October 1, 1974;

(iv) Amendment, dated October 15, 1974;

(v) Amendment, dated February 24, 1975;

(vi) Amendment, dated March 24, 1975;

(vii) Amendment, dated June 2, 1975;

(viii) Amendment, dated July 17, 1975;

(ix) Amendment, dated July 31, 1975;

(x) Amendment, dated August 4, 1975;

(xi) Amendment, dated December 30, 1975;

(xii) Letter Amendment, dated July 27, 1976;

(xiii) Letter Amendment, dated August 26, 1976;

(xiv) Letter Amendment, dated November 23, 1976;

(xv) Letter Amendment, dated November 23, 1976;

(xvi) Letter Amendment, dated March 16, 1977;

(xvii) Letter Amendment, dated July 20, 1977;

(xviii) Letter Amendment, dated July 28, 1978;

(xix) Amendment, dated April 26, 1979; and

(xx) Letter Amendment, dated June 4, 1979.

178. However, during this period, four items relating to the Hampshire application were omitted from the public file:[82]

(1) a statement that, on March 18, 1975, the Town of Hadley had filed a Petition to Deny Hampshire's application (Jt. Ex. 2; TR 3254; ABI Ex. 28; TR 3123);

(2) a letter, dated July 15, 1975, to Hampshire, from Martin I. Levy, Chief of the Commission's Broadcast Facilities Division (Jt. Ex. 2; TR 3254; ABI Ex. 29; TR 3162)

(3) an April 28, 1979 amendment supplementing Hampshire's April 26, 1979 financial Amendment (TR 3095, 3147)

(4) a March 9, 1981 letter reporting, among other things, that David Reid was withdrawing from Hampshire (Jt. Ex. 2; TR 2968-69; TR 3149, 3254)

179. Perry explained that during the pre-designation period he had followed a procedure of sending copies of the Hampshire amendments to the Brown office. (TR 3044) It was Perry's practice to send a copy of an amendment to the Brown office, at the identical time as he mailed three copies of the amendment directly to the Commission.[83] (TR 2967-68, 2972-74, 2992, 3028-30, 3043-45, 3054-55, 3144-46, 3226)

180. As noted, *supra*, in the predesignation period, four items were omitted from the file, including the July 15, 1975 Levy letter from the Commission. Perry explained that the Levy letter had not been received by Hampshire. (TR 3185, 3191-93, 3196) He further explained that a statement reflecting the Hadley Petition to Deny had not been inserted in the file because it had never been served on Hampshire.[84] (Joint Ex. 1, p. 2; TR 3185, 3191)

181. Item 4, the March 9, 1981 letter, was, at Perry's request, prepared and filed with the Commission by Hampshire's counsel. This letter informally reported the withdrawal of David Reed as a Hampshire stockholder. (TR 2984, 2968-69) This letter was sent to the public file by Perry on May 6, 1981 when he went to check on the public file after a

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[82] As detailed, *infra*, the Petition to Deny was never served upon Hampshire. Item 2 was put in the public file on November 21, 1983 and items 3 and 4 on May 1981.

[83] Perry, at some times, explained that he sent the material to Brown's office for inclusion in the public file and, at others, he related that he mailed them. (TR 2967-68, 2972-73, 3043-44) Morley, at Perry's request, on a number of occasions, delivered the material to Brown's office for inclusion in the file. (TR 3311-13, 3356-57, 3571) The Presiding Judge does not find any contradiction in this testimony. It was clear during Perry's testimony that he was the Hampshire principal responsible for maintaining the public file and that he transmitted the material to Brown's office.

[84] Amherst, despite the fact that it stipulated that Hampshire was never served with the Hadley Petition to Deny, argues that Hampshire must have received a copy of the Hadley Petition because Hampshire's "Reply and Opposition to Objection to Grant of Application," dated April 10, 1975, showed service on Hadley's Town Counsel. This contention is rejected. As noted by Hampshire, the "Objection to Grant of Applications," of Amherst, dated April 3, 1975, and directed against both the then pending Middlesex and Hampshire applications showed service on Hadley's Town Counsel.

report that Amherst had sent someone to check the file. (TR 2969-70, 3104, 3149, 3287, 3305) At the same time Perry supplied other documents for the file, as follows (TR 3088-89): a copy of the Designation Order of March 16, 1981; the April 1979 supplement to a 1979 financial amendment; and a copy of the Commission's Broadcast Procedure Manual entitled The Public and Broadcasting. (TR 3081, 3095, 3102, 3107-08)

(d) Failure To Maintain The Hampshire Public File - March 17, 1981 To Present

182. After release of the designation order on March 16, 1981, Perry understood that amendments could no longer be filed as of right, but had to be tendered for filing with a petition for leave to amend. He, therefore, discontinued the practice of preparing and signing amendments and sending three copies to the Commission and one to the public file. After designation, either Perry or counsel would prepare an amendment. However, Perry no longer sent a copy to the public file when it was filed, together with a Petition to Amend, with the Commission. Perry sent the amendment to counsel. Perry knew that such an amendment did not become part of the application until the amendment was accepted by the Presiding Judge. (TR 2968, 2987-88) In fact, no consistent procedure for getting amendments or other papers into the public file was developed or in effect after designation for hearing. (TR 2974-75, 2989-90, 2992, 3188-89, 3289) Occasionally, on an *ad hoc* basis, the manner in which a particular document would be placed in the file would come up between Perry and counsel. (TR 2974-75) For example, this occurred when the July 20, 1982 amendment (filed contemporaneous with Hampshire's effort to have the financial issue deleted based on a certification of the kind now required by the revised FCC Form 301) was sent to Perry. Counsel's transmittal letter reminded Perry of the necessity of placing the amendment in the public file. This would have been done except that, by the time Perry received the letter, the Presiding Judge had rejected the amendment by *Order* (FCC 82M-2613), released August 26, 1982. (TR 2988, 2991, 3007-08) However, it is clear that no general procedure was adopted and that this failure was the source of the problems which ensued. (TR 2974-75)

183. Perry conceded that following release of the designation order Hampshire had no fixed and determined procedures relative to sending amendments for inclusion in the public file. (TR 2973-74, 3123-24) According to Perry, he found it difficult to identify the material which required inclusions in the public file. (TR 3005) He explained that as the hearing "heated up", there was so much paper generated, that it was "tough" to separate what should have gone into the file from the material which didn't have to be included. (TR 3005)

184. However, Perry was aware of the existence of the amendments, having signed each of Hampshire's post-designation amendments. He was also aware of the need for the amendments, when accepted, to be placed in the public file. He explained that he was "too tied up with other things" to maintain the file. (TR 2991-92, 3228-29)

185. Perry acknowledged that he was "just careless" with respect to maintaining the public file, that he had not set up the procedure for filing post-designation amendments and that they "got lost in the shuffle". (TR 3188-89) He reiterated that there were so many pleadings being filed and issues being raised by Amherst that he lost sight of the public file requirements, because there was "so much flack flying." (TR 3188-89) These were times when Perry "just didn't think" about the public file requirements. (TR 2974) Perry also explained that he had "assumed," incorrectly, that Hampshire counsel had been maintaining the public file. (TR 2989-90, 3002-9, 3113, 32220-23)

186. It is appropriate to detail the amendments and documents which were filed with the Commission by Hampshire after release of the designation order on March 16, 1981, and whether they were made part of the public file in a timely manner.

(1) May 8, 1981, Letter of Counsel

187. A letter updating the March 9, 1981 letter was prepared and filed by Hampshire's communications counsel on May 8, 1981. (TR 2970-71, 2983; ABI Ex. 31) This letter was not made part of the public file until November 1983. (TR 2984, 3016, 3236) However, it is noted that the subject matter of this letter, and the earlier letter of March 9, 1981, reporting the withdrawal of Reed, was covered by a formal amendment of August 20, 1981, which, since it was prepared by Perry, was, in accordance with Perry's predesignation practice, contemporaneously mailed by Perry to the Brown law office for insertion in the public file on a timely basis. (TR 2973, 2975, 2985, 3152, 3222) Perry, at the same time, sent the original of the amendment to Hampshire's counsel who submitted it to the Commission, together with a petition for leave to amend, on September 15, 1981. (TR 2971, 2976) This amendment, filed on September 15, 1981, was accepted by *Order* (FCC 81M-3176), released October 7, 1981.

(2) July 6, 1981 amendment

188. The first amendment which had been tendered by Hampshire after designation for hearing was the amendment dated, signed and tendered for filing, together with a "Petition for Leave to File Amendment," on July 6, 1981, the date of the birth of Perry's daughter. (TR 2986; ABI Ex. 32) This amendment, which was served on the parties, including Amherst, and accepted by *Order* (FCC 81M-2291), released July 24, 1981,

reported that the Hampshire applicant's corporation had been dissolved and revived *nunc pro tunc*, as if never dissolved. (TR 2980-81, 3250) Because Hampshire did not have a system for assuring that amendments were placed in the public file, and, as Perry explained, because of the birth of his daughter, and the serious illness of his mother, he just didn't think about it. This amendment was not placed in the public file until November 1982. (TR 2986, 3305-07)

(3) October 22, 1981 Amendment[85]

189. On October 26, 1981 an amendment dated October 22, 1981 (ABI Ex. 33) was filed with the Commission and served on the parties, including Amherst, reporting that Hampshire's bank credit had been withdrawn, and stating that an alternate financial plan would soon be substituted. (TR 2977, 2981, 2995-96) This amendment, which was accompanied by a "Petition for Leave to File Amendment" (TR 3259), was accepted by *Order* (FCC 81M-3592), released November 10, 1981. It was not placed in the public file until November 18, 1983.[86] (TR 2996) However, it should be noted that an alternate financial plan, such as was contemplated by the October amendment, was tendered for filing with the Commission, together with a petition for leave to amend, on November 25, 1981. (TR 2996, 3153-54; Hampshire Ex. 1983-B) This amendment was allowed by *Order* FCC 81M-3896), released December 10, 1981. It was placed in the public file on about December 22, 1981, by Hampshire's counsel who, pursuant to discussions with Perry at the hearing session in Washington just before Christmas in 1981, mailed a copy to the Amherst law office for insertion in the public file. (TR 2978, 2990, 2993, 2997, 3221, 3306-07, 3331)

(4) Undated Amendment, filed January 5, 1982

190. Hampshire, on January 5, 1982, filed a "Petition For Leave To File Amendment." This undated amendment was an equipment manufacturer's commitment for $86,500 of equipment. The amendment[87] was accepted by *Order* (FCC 82M-0189), released January 20, 1982. This amendment was placed in the public file in July 1983. (ABI Ex. 34; TR 3265)

(5) January 9, 1982 Amendment

191. Hampshire, on January 12, 1982, filed a "Petition for Leave to File Amendment." This January 9, 1982 amendment, which contained a

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[85] The amendment is entitled "Amendment - October 23, 1981." However, it was dated October 22, 1981.

[86] Perry explained that he just didn't think of placing it in the public file; it "fell through the cracks." (TR 3002)

[87] This amendment also reported that Perry had filed an application on December 4, 1981 for a new standard broadcast station in Easthampton, Massachusetts.

balance sheet for Amvest Leasing & Capital Corp. (Amvest) as of July 31, 1981, was accepted by *Order* (FCC 82M-0285), released on January 28, 1982. (ABI Ex. 35) This amendment was placed in the public file in July 1983. (TR 3004, 3267)

(6) December 6, 1982 Amendment

192. On December 9, 1982, Hampshire filed a "Petition for Leave to File Amendment." The amendment, dated December 6, 1982, reported changes in the status of various broadcast licenses and applications in which Perry or his wife had interests. This amendment, which was accepted by *Order* (FCC 82M-4106), released December 28, 1982, was placed in the public file in July 1983. (ABI Ex. 36; TR 3000, 3008-09, 3158, 3268)

(7) April 16, 1983 Amendment

193. Hampshire filed a "Petition for Leave to File Amendment" on April 20, 1983. The amendment, dated April 16, 1983, reported that in March 1983 a lawsuit entitled *WPOW, Inc. v. MRLJ Enterprises*, alleging copyright infringement, unfair competition and fraudulent and corrupt practices, was filed. Perry was a defendant. This amendment, which was accepted by *Order* (FCC 83M-1872), released June 8, 1983, was placed in the public file in July 1983. (ABI Ex. 37; TR 3009-10, 3280)

194. Perry, in explaining his failure to have forwarded copies of these amendments for inclusion in the public file in a timely manner, acknowledged that they "slipped through the cracks." (TR 3002, 3004, 3009, 3260)

(e) Hampshire's Review Of The Public File - May 1981, July 1983, and November 18, 1983

195. From time to time, after September 1974, when Perry was in Amherst, he looked in on Bruce Brown or Jeffrey Brown, the custodians of the public file, making "essentially just sort of courtesy calls;" and not according "a great deal of time" to a review of the file. (TR 3072) Perry would look at the file to see what was the most recent filing and see if that appeared to be consistent with the time frame that was operative. (TR 304) Perry would glance at the file to see that the most recent amendment was there. (TR 3060) Perry, however, did not ordinarily review the file on an item-by-item basis. (TR 3045-48) Only one such inspection occurred over the time which elapsed between the September 1974 filing of the application and the specification of the public file issue. That inspection occurred in May 1981, as a result of an Amherst attempt to inspect the Hampshire public file.

196. On May 4, 1981, Amherst attempted, unsuccessfully, to inspect the Hampshire file. Bruce Brown telephoned Perry to report that a woman who worked for Amherst had sought to review the file. (TR 3104-

05) Both Brown and Perry were concerned that "personal correspondence of Hampshire" might inadvertently be made available to Amherst. (TR 3104-05)

197. On the day following the telephone call and before the woman was accorded access to the file, Perry traveled to Amherst to review the file on an item-by-item basis. (TR 3045, 3108-09, 3172) He found the file to be incomplete. He issued instructions for missing items to be put into the file. He did not follow-up to ascertain whether his instructions were carried out and, in fact, the July 15, 1975 Martin Levy letter was not incorporated into the file at that time. (TR 3046-47)

198. After Perry and the Amherst employee each had reviewed the Hampshire file, Amherst filed its 1981 Petition seeking a public file issue. On May 8, 1981, Perry executed an affidavit, which was supplied to the Commission, as part of Hampshire's opposition to the enlargement request. Perry's affidavit recited that on May 5, 1981 Perry had gone to Amherst, bringing with him a duplicate copy of the Hampshire file, that he removed private correspondence from the file which contained the complete Hampshire application and 11 subsequent amendments. He disclosed that he had added the following material, which he found to be missing:

1. The FCC Order designating the Hampshire application for hearing.
2. A supplement to Hampshire's April 1979 financial amendment.

Perry further noted that a copy of "The Public and Broadcasting" was not in the file; that he did not have a copy with him, but on May 6, 1981 called the FCC Field Office in Boston and requested that a copy of the document be mailed directly to Attorney Brown's office. Perry reported that on the same date he sent Brown a copy of a letter from Hampshire's counsel to the Commission advising of a pending change in the Hampshire ownership percentages.

199. Amherst's request for a public file issue was denied by the Presiding Judge by *Order* (FCC 81M-2951), released September 17, 1981. Following the denial, Hampshire conducted no further item-by-item file inspections. In July 1983, Amherst again requested a public file issue, and, as a result, either Perry or Hampshire's counsel, with Perry's knowledge, asked Morley to inspect the Hampshire file. (TR 3182-92, 3308) Perry knew that Morley needed a checklist to ascertain whether the Hampshire file was complete. However, Morley was not furnished with such a checklist. (TR 3182, 3214)[88]

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[88] As noted, *infra*, it was only after the public file issue was added by *Order* (FCC 83M-3575), released October 10, 1983, that Hampshire, through its counsel, completed a master list of the papers which were required to be in the file. (TR 3180-82)

200. In late July 1983, when Morley was delegated to review the Hampshire public file, he was advised by Perry and counsel, that Amherst had filed a pleading alleging the omission of certain papers from the Hampshire file. In telephone conversations with Perry and counsel, Morley was told that counsel had, at Perry's request, sent a copy of these papers to the public file, prior to July 29, 1983, by Federal Express. Perry, or possibly counsel, provided Morley with an itemization of those five or six papers. (TR 3002-05, 3156-58, 3321-26)

201. By its pleading on July 19, 1983, Amherst had alleged that on July 5, 1983, Hampshire's public file (when it was inspected by Peene, an Amherst principal) did not contain the financial amendments filed January 5 and January 12, 1981, the December 6, 1981 amendment, and the April 16, 1983 amendment, referred to, *supra.*[89] (TR 3002-09, 3156)

202. On July 22, 1983, Hampshire mailed to the Amherst law office for insertion into the file all items alleged by Amherst to be missing. Perry, at this time, believed that the file was now complete, although he could not be certain without checking, which he did not do at that time. (TR 3198, 3211, 3215, 3221)

203. Morley's purpose in reviewing the public file was to ascertain whether the papers sent by counsel had been received. (TR 3321-25, 3327-28, 3333, 3336) Perry was aware of the limited purpose of Morley's visit and that Morley lacked sufficient knowledge to determine the file's completeness.[90] (TR 3182, 3333-34)

204. Morley determined that the papers sent by counsel were in the public file. However, he could not and did not check to see if the file was complete. (TR 3339-40, 3365-66) Nevertheless, Hampshire filed as part of its opposition to the Petition to Enlarge, a Morley affidavit in which he recited, in pertinent part (ABI Ex. 41; TR 3368):

> "On 7/29/83 I visited the law office of Jeffrey B. Brown, Esq., in Amherst, MA to inspect the Public File of Hampshire County Broadcasting Co., Inc.
>
> I found the file readily available and, to the best of my knowledge, complete and up to date."

205. At that time the following papers were absent from the file:

(1) a July 15, 1975 letter from Martin Levy of the Commission's staff, to Hampshire;

(2) a statement that the Town of Hadley had filed a Petition to Deny Hampshire's application;[91]

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[89] Amherst also asserted, incorrectly, that Hampshire's amendment of November 25, 1981, was missing from the file. (TR 3156; Joint Ex. 2, para. 2, p. 2) Amherst did not allege the absence of any other documents.

[90] Perry acknowledged that one couldn't really be sure that everything was there without having had access to the files in Washington. (TR 3182)

[91] As noted, *supra*, this petition was never served on Hampshire and, as a result, was not required, to be in the file.

(3) the May 8, 1981 letter of Hampshire's counsel

(4) Hampshire's July 6, 1981 Amendment; and

(5) Hampshire's October 22, 1981 Amendment.

206. As noted, *supra*, the Presiding Judge, by *Order* (FCC 83M-3575), released October 11, 1983, specified the public file issue against Hampshire and scheduled a further hearing for November 21, 1983. On November 18, 1983, to get ready to testify on November 21, Perry traveled to Amherst and checked Hampshire's public file. (TR 2993, 3010-15) He found therein all required documents except the following:

(1) a letter from Mr. Martin Levy of the Commission's staff dated July 15, 1975 (TR 3015-16; ABI Ex. 29); this letter was not in fact received by Hampshire in 1975. (TR 3016, 3018-19, 3046, 3086, 3109, 3161-62) A copy was obtained later from the Commission's files, after Amherst had mentioned it in its petition to enlarge issues filed on May 7, 1981. The copy obtained from the Commission files was sent by Perry to the public file. (TR 3018-19, 3031, 3086, 3110, 3150, 3238-40) However, Perry did not find a copy in the file on November 18, 1983. He could not account for why it was not there. (TR 3018-19, 3150)

(3) [92] the letter of May 8, 1981, which was also sent by Perry to the file along with the Martin Levy letter referred to in (1), but which, unaccountably, was absent from the file on November 18, 1983. (TR 3016-17, 3046-47, 3150, 3238-40)

(4) the July 6, 1981 amendment relating to dissolution and reinstatement *nunc pro tunc* of the Hampshire corporation. (TR 3017) and

(5) the October 22, 1981 amendment, relating to the loss of the bank credit. (TR 3017)

These missing items were mailed that same day to the Amherst attorneys for insertion in the file. (TR 3014-15, 3017, 3179-80, 3239) They were subsequently placed in the file. (TR 3135-36) Perry had not been aware that these items were missing before his check of the file on November 18, 1983 and had, mistakenly, believed the file to be complete. (TR 3211, 3215)

207. One member of the public, other than representatives of Amherst, ever sought access to the file, and that was on June 6, 1981. (TR 3191, 3277, 3278-79, 3360; ABI Ex. 41)

Ultimate Findings and Conclusions

1. This proceeding involves the mutually exclusive applications of Hampshire County Broadcasting Company, Inc. (Hampshire) and Amherst Broadcasting, Inc. (Amherst) for authority to construct a new commercial FM radio station on Channel 265A at Amherst, Massachusetts. There are qualifying issues which must be resolved relative to both proposals. It is well established that only basically qualified applicants are entitled to comparative consideration. *Louis Aldeman*, 28 FCC 432 (1960); affirmed *sub nom.; Guinan Realty Co., v. FCC*, 111 U.S. App. D.C. 371, 297 F. 2d 782 (1961). For this reason, the qualifying issues specified

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[92] The Hadley Petition to Deny (item 2) was not required to be placed in the public file.

relative to the applicants will be considered and disposed of before addressing their comparative strengths and weaknesses.

2. The Commission, in its *Memorandum Opinion and Order*[93] (FCC 81-108, para. 3), designating the Amherst and Hampshire applications for hearing, set forth a brief history as to the filing and prosecution of the Amherst application. More particularly, it noted that, on January 8, 1979, it released a *Memorandum Opinion and Order* (FCC 78-912), denying Amherst's request for waiver of the minimum mileage separation requirements of Section 73.207 of the Rules, 47 CFR 73.207; that Amherst was afforded 30 days to amend its application to comply with the cited Rule or face dismissal; that Amherst requested an extension of time to file its amendment[94]; that Amherst filed an amendment on February 26, 1979, which was voluntarily withdrawn on March 8, 1979; that a new amendment was filed by Amherst on March 9, 1979, together with a petition for acceptance of the amendment; that the Broadcast Bureau (Bureau), by letter dated August 1, 1979, ruled that the March 9, 1979 amendment constituted a major amendment, as defined by 47 CFR 73.3575(a)(1), returned the amendment as unacceptable for filing and dismissed the Amherst application. Amherst filed a "Petition for Reconsideration" on August 31, 1979 and Hampshire opposed this request. The Commission, in the *Designation Order*, ruled that a substantial and material question of fact exists with respect to Amherst's claim of good cause for submission of its March 9, 1979 amendment after the deadline specified in the Commission's *Order* (FCC 78-912).

3. The Commission designated issue 1(a) to determine whether Amherst complied with the Commission's directive in the cited *Order*. The facts relative to this matter are set forth in the findings (paras. 9 through 30). It is undisputed that Amherst did not amend its application within the 30 day period provided by the Commission in its *Order* (FCC 78-912), released January 8, 1979. The amendment in question was not submitted until March 9, 1979. The Presiding Judge agrees with the Bureau that the record evidence establishes that Amherst, upon learning that its request for waiver of 47 CFR 73.207, the short spacing rules, was to be denied, acted with due diligence in locating a new site which would be in compliance with the Commission's Rules. Edward H. Peene, Jr. (Peene), president of Amherst, reacted with reasonable alacrity in his initial effort to secure a new site. The February 5, 1979 request of Amherst for an extension of time was necessitated by the fact that its engineering consultant was not able to complete all of the necessary work for the preparation and filing of the change of site amendment.

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[93] Hereinafter referred to as *Designation Order*.

[94] Hampshire opposed the extension request and urged dismissal of Amherst's application. This request was not ruled upon by the Commission.

4. Amherst, on February 26, 1978, filed an amendment specifying a new site. Shortly thereafter, it learned that it had to withdraw the amendment when Hampshire, in a filing with the Commission, pointed out that the amendment resulted in more than a 50% change in Amherst's coverage and constituted a major amendment.

5. The evidence establishes that it was Amherst's consulting engineer who committed the error in failing to consider and note that the February 26, 1979 amendment involved more than a 50% change in Amherst's coverage. Both Peene and the consulting engineer acted promptly in locating a new site and filing the March 9, 1979 amendment. Issue 1(a) is resolved in favor of Amherst. It is concluded that Amherst met its burden under issue 1(a) of establishing that it made reasonable efforts to comply with the Commission's directive that an amendment be filed within 30 days.

6. Issue 1(b) seeks to determine whether the March 9, 1979 amendment would result in a major change of the Amherst application, pursuant to 47 CFR 73.3573(a)(1), and, if so, whether circumstances exist warranting a waiver of the cited Rule. 47 CFR 73.3573(a)(1) provides, in pertinent part, that a major change for FM stations is any change which would result in a change of 50% or more in the area within the station's predicated 1 mV/m field strength contour. Under this issue it must be determined whether the March 9, 1979 amendment specifying a new Amherst transmitter site resulted in such a major change. Extensive testimony was taken relative to this question and the opinions of the 3 engineering consultants are set forth in the findings (paras. 34-43). Amherst's consultant submitted an analysis indicating that the actual change in area was 47%. While the calculations of Amherst's consultant were done in accordance with prescribed engineering practices, it was appropriately noted by Hampshire's consultant that certain errors existed as to the calculations of the height above average terrain along certain radials.[95] Hampshire's consultant concluded, based on his revised calculations, that the change in Amherst's area would total 52.4%.[96] As a result,

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[95] Perry, Hampshire's consultant, recalculated the height above average terrain along the radials and found that on the 247.5° and 292.5° radials the distance to Amherst's 1975 contour was off by .2 and .1 miles, respectively. He also found that Amherst's distance on the 247.5° and 337.5° radials for the 1979 site were off .2 and .8 miles, respectively. Perry also challenged Amherst's plotting of the 1 mV/m contour along the 270° radial for the 1979 site.

[96] Hampshire's consultant, Perry, initially submitted studies showing that the amount of change in area resulting from Amherst's March 9, 1979 amendment ranged from 51.5% to 81%, depending on the methodology utilized. The Presiding Judge agrees with the Bureau that this study should not be credited because the 1975 and 1979 contours were not drawn in accordance with the acceptable engineering practice of using smooth curves.

Amherst's consultant recalculated Amherst's 1975 and 1979 contours, utilizing the elevation data submitted by Hampshire. However, this consultant found that the distances to the 1 mV/m contours differed, in some respects, from those specified by Hampshire's consultant. Amherst's consultant calculated that the percentage change was 49.4%. These differences between the engineering consultants results from the method the engineers employed in reading the Commission's 50-50 curves in calculating the distances to the contours.

7. The Presiding Judge agrees with the Bureau that the Commission's 50-50 curves and standard elevation maps cannot be read with a sufficient degree of accuracy and precision to reach a definitive conclusion as to whether the area change amounts to 49% or 52%. In view of this apparent judgemental factor which enters into the ultimate finding, it is ruled that the record evidence does not support a conclusion that the March 9, 1979 amendment would result in a major change in Amherst's application, pursuant to 47 CFR 73.3573(a)(1), requiring the dismissal of the amendment. It is, therefore, ruled that issue 1(b) is resolved in favor of Amherst and that it is entitled to comparative consideration as it relates to compliance with the Commission's directive (issue 1(a)) and the major amendment question (issue 1(b)) specified by the Commission.[97]

8. Issue 5 seeks to determine whether the Hampshire proposal complies with the requirements of 47 CFR 73.315(a) and, if not, whether circumstances exist which warrant a waiver of the Rule.[98] The cited Rule provides that the transmitter location of an FM station shall be placed so that a minimum field strength of 70 dBu (3.16 mV/m) will be provided over the entire community proposed to be served. It is undisputed that Hampshire's predicted 3.16 mV/m (70 dBu) contour does not encompass all of Amherst. The question that must be answered is whether a waiver of the Rule is warranted.

9. Amherst is a New England town with a land area of 27.6 square miles. The town of Amherst forms a rough rectangle about 10 miles north to south and 5 miles east to west. The portion of Amherst that will not receive a city grade 3.16 mV/m signal are two triangular areas[99] located a distance from the town population centers. As noted in the findings (para. 52), New England towns are not organized on the traditional basis of city, town, county or unincorporated area that is used in most of the country

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[97] The Presiding Judge also agrees with the Bureau that the particular facts in this case would warrant waiver of the Rule were it ruled that the area changed approximated 52%.

[98] Issue 4 is the comparative issue. Issues 2 and 3 were resolved, by Summary Decision, in favor of Amherst.

[99] One such area is in the northeast corner and the other in the southeast corner of Amherst.

and their boundaries are not determined by population centers.[100] These New England towns are analogous to counties in most parts of the country.

10. There are presently 33,210 persons residing in Amherst. According to Amherst's engineering consultant, the land area of Amherst not encompassed within the 3.16 mV/m contour constitutes 2.5 square miles (9.4%). Hampshire's engineering consultant estimated that the land area is 1.5 square miles (5.4%). 341 persons reside within the 1.5 square mile area and 639 persons (1.89%) reside within the 2.5 square mile area. Adopting the worst set of facts, it is found that Hampshire will provide the required city grade signal to all but 9.4% of the area of Amherst and 1.89% of the population.

11. It is axiomatic that those Commission Rules that require an applicant to maximize its technical service to its proposed community are important and that waivers of these Rules should be granted only when a persuasive showing has been made. As noted, the two areas of Amherst which Hampshire fails to serve with the required city grade signal (70 dBu) are located a distance from the town population. Additionally, these areas are mountainous and swampy and lightly populated. The Presiding Judge agrees that the facts in the instant case support the conclusion that a waiver of Section 73.315(a) of the Rules, 47 CFR 73.315(a), is warranted. The unusual geography surrounding Amherst; the unique nature of the New England town and the unsuccessful efforts of the Hampshire principals to locate a site that would permit coverage of all of Amherst with a city grade signal, together with the fact that more than 98% of the population of Amherst will be served with the required signal, warrants a waiver of the Rule. *Peoples Broadcasting*, 68 FCC 2d 1570 (1978); *Quality Broadcasting Co.*, 62 FCC 2d 586 (1977).[101] It is ruled that Hampshire has met the test established by the Review Board in *Garo W. Ray, et al.*, 36 FCC 1038, 1041 (1964). The equities present in this case weigh in favor of relaxation of the Rule.

12. It is recognized that Hampshire's proposal, as prepared by Perry and as filed on July 8, 1975, fully complied with the requirements of 47 CFR 73.315(a) and that it was the Commission's change in the F (50-50) curves which resulted in Hampshire's failure to comply with the city coverage requirements. However, the Presiding Judge is not persuaded that this is an "equitable factor" in favor of a waiver of the Rule. The

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[100] The two population centers of Amherst are Amherst Center and North Amherst, over which Hampshire would provide more than the required city grade signal.

[101] Amherst did not demonstrate that a suitable alternative site was available to Hampshire. The record establishes that there was strong local opposition to a transmitter site at Mount Holyoke in Hadley. The Hampshire principals acted reasonably in concluding that that site was unavailable. Additionally, it was not shown that the Whatley site could receive FAA clearance. (TR 2428-29)

Report and Order, 53 FCC 2d 855, was adopted on May 29 and released on June 27, 1975, a month before Hampshire filed its amendment changing its site. While the new application of the 50-50 curves did not become effective until August 1, 1975, the timing of the filing of Hampshire's amendment only 4 days before the effective date and the fact that Perry, Hampshire's consultant and principal, held himself out as an expert engineering consultant, militate against attributing any decisional significance to these facts.

13. Issue 6 seeks to determine whether Hampshire is financially qualified to construct and operate its proposed station. This financial issue[102] was added by the Presiding Judge because, at the time, Hampshire had indicated its intention to replace its equipment proposal but had not done so and, also, because Hampshire's bank loan letter had expired.

14. The cost of construction of the Hampshire proposal is estimated to be $125,162 and the cost of operation of the station for a 3-month period is estimated to be $40,572. As a result, the total cost of construction and operation is $165,734. To meet these costs, Hampshire relies on loans totalling $101,521[103] and on an agreement with Amvest Leasing and Capital Corporation (Amvest) to provide it with equipment valued at $86,500. After deducting 5 monthly payments, the deferred credit provided by Amvest is $77,053. When the loans and Amvest credit are added to the $1,100 of existing capital available to Hampshire, it results in total available funds to construct and operate the station of $179,674. For the reasons articulated, *infra*, it is concluded that these funds will be available and that Hampshire is financially qualified to construct and operate its proposed facility.

15. Amherst's contention that Hampshire's equipment leasing agreement with Amvest is unacceptable is rejected. Amvest is an established leasor of broadcast equipment. It is well established that broadcast applicants are justified in relying on equipment leasing proposals by Amvest to demonstrate their financial qualifications.[104]

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[102] The Presiding Judge ruled that the financial issue was limited to the question of availability of funds necessary to construct and operate the proposed facility and did not encompass inquiry into the costs of construction and operation. (TR 1544, 1843)

[103] As detailed, *infra*, 3 loans are to be available to Hampshire totalling $110,000. Since the interest for 5 months would approximate $8,479, the net loan funds available are $101,521.

[104] *Washington's Christian Television Outreach, Inc.*, 94 FCC 2d 1360. (FCC 83R-62), released August 31, 1983; *Valle Verde Broadcasting Corp.* (FCC 82M-0969), released March 25, 1982; *Media South Broadcasting Corp.* (FCC 82M-1097), released April 7, 1982; Tidewater Television Corp. (FCC 82M-1126), released April 8, 1982; *Light Communications, Inc.*, BC 34763, released December 21, 1981; and *Trinity Broadcasting of Denver, Inc.*, BC 34763, released August 15, 1980.

16. It is undisputed that the $50,000 loan from Rockland Trust Co. is available to Hampshire. Amherst does challenge, however, the availability of the $25,000 Morley loan and the $35,000 Burmeister loan.[105] As detailed in the findings (paras. 73-76), Morley and his wife have obtained a $25,000 loan from the Shawmut Melrose-Wakefield Bank. Their $25,000 loan commitment to Hampshire, however, is not dependent upon this loan to them from the bank. The Morleys have shown they have funds available from their own resources to meet their commitment to Hampshire, if necessary. The contention of Amherst that the bank loan cannot be given credence because the collateral has not been stated with sufficient specificity is rejected. As detailed in the findings, the collateral is to be the Morleys' passbook and/or stocks and bonds. The Morleys have indicated a willingness to meet this requirement. It is ruled that the $25,000 loan from the Morleys is available to Hampshire.

17. Amherst's argument that Burmeister does not have sufficient funds or personal assets to meet the $35,000 loan commitment to Hampshire is not persuasive. As detailed in the findings (paras. 77-82), the Burmeisters have available current liquid assets approximating $75,000. Additionally, their total assets are $250,000 and their liabilities are $55,000. It is found that the Burmeisters have the necessary financial resources to meet their loan commitment to Hampshire and it is concluded that Hampshire is financially qualified to construct and operate its proposed station.

18. Issue 7 seeks to determine whether Hampshire complied with the requirements of 47 CFR 1.65 relative to reporting timely the dissolution of its corporate status and, if not, the effect of such failure on the basic and/or comparative qualifications of Hampshire to be a broadcast licensee.

19. Hampshire was incorporated under the general laws of the Commonwealth of Massachusetts in August 1973 and was dissolved by the Supreme Judicial Court, Sussex County, on January 10, 1979. The dissolution of Hampshire was not disclosed to the Commission until Amherst raised the matter in a "Petition To Enlarge Issues," filed May 7, 1981. Subsequently, on July 6, 1981, Hampshire amended its application to reflect a "Revival Certificate" issued by the Secretary of State of Massachusetts on June 25, 1981, which revived the corporate status of

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[105] Amherst's claim that Perry has not established his financial ability to pay his share of the pre-grant legal costs is rejected. *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1092 (Rev. Bd. 1982). Hampshire anticipates $22,000 in future legal costs and Hampshire's principals have agreed to finance these costs out of their personal income in direct proportion to their ownership interests in Hampshire. These principals have fully paid these legal costs to date and there is no reason to believe that they will be unable to continue to do so. Additionally, it is noted that there is a cushion of approximately $14,000 available to meet these legal fees.

Hampshire "for all purposes and without limitation of time with the same power, duties and obligations as if it had not been dissolved."

20. The Commonwealth of Massachusetts dissolved Hampshire in 1979 because of Hampshire's failure to pay franchise taxes, interest and penalties for the years 1973-1978 and also failure to file annual reports and pay the fees relative to such filings for the same period of time. Perry, a Hampshire principal, received the necessary tax forms and annual report forms from the State but, since he believed that Hampshire was not required to pay corporate taxes because it was dormant, threw away the tax forms. He did this after having read the first one he received; those he received later he threw away without opening the envelopes.

21. When counsel for Hampshire informed the principals that a designation order was to be issued in the near future, Perry and Morley, Hampshire principals, decided to check and update various aspects of the Hampshire application. Morley was given the responsibility to check with the Secretary of State for Massachusetts to insure that everything was in order relative to the corporate status of Hampshire. It was at that time, February 25, 1981, that Morley learned that Hampshire's corporate status had been dissolved as of January 10, 1979.[106] Morley was informed by an employee of the Secretary of State of Massachusetts that Hampshire could be revived by filing the franchise tax forms and annual reports, and paying the taxes, fees and penalties. He was told that this was a routine matter. Morley consulted with Hampshire's local counsel and was told that such dissolution happens frequently and that it was "inconsequential." Morley promptly informed Perry of Hampshire's dissolution and the requirement to file the annual reports and to pay the franchise taxes, penalties and fees for the years when such taxes and fees were not paid. Morley made Perry aware of the information he had received from the State employee and local counsel that reviving the corporation was a routine matter.

22. As noted, *supra*, Hampshire was not revived to corporate status until June 25, 1981, some four months after Morley had learned of its dissolution. During this period, the Commission was not informed of Hampshire's corporate dissolution. The Hampshire principals, Perry, Morley and Burmeister, met on March 27, 1981 and decided to continue to prosecute the Hampshire application and Morley was instructed to revive the corporation with "dispatch" (para. 98, *supra*). The record does not

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[106] The Presiding Judge rejects the contention of Amherst that the Hampshire principals were aware of the corporate dissolution as early as 1979. This contention rests upon documents which are not part of this hearing record. The notification by the Commonwealth of Massachusetts in August 1978 that Hampshire would be dissolved unless it paid back taxes, filed annual reports and paid filing fees was not offered in evidence in this proceeding and will be given no consideration. Issues which involve possible lack of candor must be resolved on the basis of the hearing record.

support Amherst's contention that Hampshire withheld seeking revision in a more timely fashion because it was unable or unwilling to pay the taxes, fees and penalties. As detailed in the findings (paras. 100-101, *supra*), Morley requested the necessary forms to revive the corporation from the State in late February 1981 and did not receive them until April 13, 1981. Additionally, Morley mailed the completed forms in mid-May 1981 to the Secretary of State. However, they were lost and he had to reconstruct the data and refile on June 16, 1981. When the taxes, fees and penalties were calculated, he filed the annual reports on June 25, 1981 and Hampshire's corporate status was revived. The record established that Morley acted with reasonable diligence in having Hampshire's corporate status revived.

23. Section 1.65 of the Rules, 47 CFR 1.65, makes clear that each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application. Whenever the information furnished in such an application is no longer "substantially accurate and complete in all significant respects," the applicant is required to amend the application as promptly as possible, and, in any event, within 30 days, to furnish such information. Additionally, such an amendment is required to be filed if there has been "a substantial change as to any other matter which may be of decisional significance." The dissolution of the corporate applicant by state action is such a change in circumstances as to require its being timely reported, since the information in the application as to its corporate status is no longer substantially accurate and complete. *Muncie Broadcasting Corporation*, 89 FCC 2d 123, 126 (para. 6) (Rev. Bd. 1982).

24. However, the Commission has recently emphasized that the Commission's limited hearing resources should not be expended on inquiries into Section 1.65 compliance unless the subject involves a matter of decisional significance or there was an intent to conceal or a pattern of "carelessness or inattentiveness." *Merrimack Valley Broadcasting, Inc.*, _____ FCC 2d _____, FCC 83-465, released October 13, 1983. The record does not warrant a conclusion that there was either an intent to conceal or a pattern of carelessness or inattentiveness in the instant case. Both Perry and Morley were of the view, based on information provided by a State employee and local counsel, that Hampshire would be revived upon the payment of the taxes, penalties and fees then due the State. The record establishes that they were justified in their belief. While Perry is subject to criticism for his cavalier attitude in discarding the forms he received from the State for the payment of taxes and fees, it must be recognized that reasonable efforts were undertaken to reinstate Hampshire's corporate status once it came to Hampshire's attention. Since the corporate dissolution resulted from the violation of a technical state requirement which was readily cured by payment of the past due fees,

taxes and penalties, it is ruled that the failure to report the dissolution did not involve a matter of "decisional significance." *Sherwood, J. Inc., et al.*, 63 FCC 2d 151, 161 (Rev. Bd. 1976).[107]

25. Nevertheless, the Presiding Judge is constrained to address and comment upon the practice of having Morley submit an affidavit to the Commission when he was not the Hampshire principal with particular knowledge of the facts. As detailed in the findings (paras. 101-102), Morley submitted an affidavit to the Commission representing that the reason Hampshire had been dissolved was non-payment of taxes "since all tax notices had been sent to an incorrect address." Upon learning that Hampshire no longer leased a post office box, Morley "assumed," incorrectly, that the notices had been sent to the wrong address. Perry, who knew that he had cavalierly discarded the notices, reviewed Morley's affidavit prior to its submission to the Commission. His explanation for permitting the Morley affidavit to be submitted to the Commission was that his wife had given birth that day and, having had no sleep, he didn't read the affidavit with due care. While it is concluded that Hampshire met its burden of establishing that it first learned of the dissolution on February 28, 1981, that it proceeded with reasonable efforts to have the corporation revived and did not make a conscious effort of secreting its dissolution from the Commission, it is ruled that a slight comparative demerit must be assessed against Hampshire because of the submission of the inaccurate Morley affidavit.[108]

26. Issue 8 seeks to determine all of the facts and circumstances surrounding the submission of page 36 of Hampshire Exhibit 6 into evidence and, in light of the evidence adduced, its effect on the basic and/or comparative qualifications of Hampshire to be a broadcast licensee. All of the facts and circumstances surrounding the submission of this document are detailed in the findings (paras. 106-128), and no purpose would be served by repetition. Suffice it to say, Hampshire mistakenly submitted an incorrect page 36 to Hampshire Exhibit 6 in that it submitted the wrong Figure 2 which was part of the Engineering Report submitted to the Commission in 1973 with the "Petition For Rulemaking."

27. The facts establish that Perry's error in confusing an earlier version of Figure 2 with the latter version of that same Figure 2, which was actually submitted to the Commission in 1973, was innocent and inadvertent. The Presiding Judge rejects the many inferences that Amherst argues should be drawn relative to this incident. Suspicion is no substitute for evidence. It is ruled that the earlier draft version of Figure

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[107] Had the *Sherwood* holding been brought to the Presiding Judge's attention at the pleading stage, it is unlikely that a 47 CFR 1.65 issue would have been specified.

[108] It has been emphasized over the years that the Commission must feel free to rely upon the representations made to it by applicants and licensees.

2, which Perry mistakenly believed was the correct page 36 to Hampshire Exhibit 6, and the Figure 2 actually filed with the Commission both support Hampshire's findings set forth in paragraph 129 of its "Proposed Findings of Fact and Conclusions of Law." Both versions of Figure 2 show that, from an optimized site, complete coverage of the town of Amherst might not be achieved. Equally persuasive is the fact that Table 1 of the Engineering Report (Hampshire Ex. 6, p. 35) disclosed that coverage of all of the population of Amherst would not be accomplished.

28. Perry had held himself out as an engineering expert and, as such, he was obligated to see to it that all of the engineering data submitted was accurate and correct. However, Amherst's contention that Perry's action was "reckless" is rejected. The record evidence establishes that Perry's error was caused by inadvertence and that there was no intention to mislead this Commission. The Presiding Judge agrees with Hampshire that there does not appear to be any reason for Perry to submit the earlier version of Figure 2 into evidence in place of the final version submitted to the Commission. The Presiding Judge accepts Perry's explanation that he believed that the earlier version of Figure 2, which had only one site depicted, was the map submitted to the Commission. The texts of both the "Petition For Rulemaking" and the Engineering Report indicate that there is only one site depicted on Figure 2. Stated simply, after the passage of approximately eight years, Perry was mistaken in his recollection. This issue is resolved in Hampshire's favor. It is ruled that Hampshire has met its burden of establishing that the error was inadvertent and that it does not impact on Hampshire's qualifications to be a Commission licensee or require the assessment of a comparative demerit.

29. Issue 9 seeks to determine whether Hampshire maintained its local public file in accordance with the requirements of Section 73.3526(a) of the Rules, 47 CFR 73.3526(a), and, if not, the effect on Hampshire's basic and/or comparative qualifications. The cited rule requires, in pertinent part, that applicants place in a file maintained for access by the public in the community in which a broadcast station is sought, a copy of the application; all exhibits, letters and documents tendered as part of the application; all amendments to the application; and all correspondence between the Commission and the applicant pertaining to the application. The findings establish that Hampshire failed to comply with these public file requirements.

30. Perry, Hampshire's principal stockholder, was personally responsible for the maintenance of the public file and, with a few exceptions, the file was appropriately maintained prior to designation of the Hampshire and Amherst applications for hearing. Perry had established a predesignation procedure whereby he forwarded a copy of all amendments to

the public file when he executed them. However, this procedure was not followed subsequent to the release of the designation order. In fact, there was a total lack of any post-designation procedures relative to compliance with Section 73.3526(a). Perry was well aware of the requirements to maintain the public file, having sought an issue against Amherst in February 1978 relative to the renewal of the license of Station WTTT to Amherst, and also by virtue of the fact that in May 1981 Amherst had sought, unsuccessfully, to have a Section 73.3526(a) issue specified against Hampshire. Additionally, Perry was aware of the various amendments filed subsequent to designation since it was he who executed all of them. However, he explained that since post-designation amendments required a petition for leave to amend and that their filing in the public file would only be appropriate if they were accepted, he failed to establish a system or procedure to assure that such amendments were placed in the public file after their acceptance by the Presiding Judge. Perry attributed this failure to carelessness, explaining that the various amendments "just got lost in the shuffle." The post-designation documents, some seven in number, which were not placed in the public file are detailed in the findings (para. 186). This failure on Perry's part warrants assessing a comparative demerit against Hampshire.

31. It is appropriate to also consider the procedure followed by Hampshire in responding to Amherst's request in 1983 for a Section 73.3526(a) issue. As noted, *supra*, it was Perry who was responsible for the maintenance of the public file. Yet, he had Morley go to Amherst in July 1983 to study the file to ascertain whether certain documents recently sent to the file had been filed.[109] Perry was aware of the limited purpose of Morley's inspection of the public file and that Morley lacked sufficient knowledge to determine the file's completeness. Yet, Hampshire submitted an affidavit, as part of its opposition, wherein Morley attested to the fact that the public file was complete and up-to-date, to the best of his knowledge. In fact, four items were still missing from the public file. Certainly, applicants, when making representations to this Commission, should assure themselves that the individual or individuals attesting to the correctness and accuracy of facts are those in a position to do so. This incident reflects adversely on Hampshire and, together with its failure to maintain the public file, mandates the assessment of a slight comparative demerit.

32. Having found both Amherst and Hampshire basically qualified to be a broadcast licensee, and having resolved all of the issues, other than whatever comparative impact there might be, in favor of the applicants, it is now appropriate to address the comparative choice to be made in this

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[109] These documents were the amendments noted by Amherst in its "Petition To Add An Issue," filed July 20, 1983, as not being part of Hampshire's public file.

proceeding. The Commission, in its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398 (1965), stressed that the two primary objectives to be accomplished in making the comparative choice are to obtain the best practicable service to the public and to achieve the maximum diffusion of control over the media of mass communications.

33. As the Review Board recently noted, diversification is an objective of primary significance in determining which applicant shall prevail under the comparative issue. *Multiplex Communications, Inc.*, ___ FCC 2d ___, 54 RR 2d 733, 734 (Rev. Bd. 1983) In making its choice between competing applicants, the Commission has consistently considered ownership interest in existing stations to be most significant when located in the principal community proposed to be served, followed by those located in the remainder of the service area and then by those throughout the United States.

34. As detailed in the findings (paras. 152-155), Amherst is the licensee of the only commercial broadcast facility in Amherst, Massachusetts. It is the licensee of daytime only Station WTTT. Hampshire, on the other hand, has no media interests, although Perry, a 50% owner of Hampshire, has controlling interests in the permittee or licensee of Stations WRTT, Vernon, Connecticut, WGFP, Webster, Massachusetts, and WATD-FM, Marshfield, Massachusetts.[110] These stations are located outside the service area of the proposed station, with the closest located approximately 38 miles south of Amherst.[111] It is ruled that Amherst's ownership of the only commercial broadcast station in the community of Amherst is the most significant factor. Therefore, a substantial preference is awarded Hampshire relative to the diversification factor. *Golden State Broadcasting Corporation*, 94 FCC 2d 212 (Rev. Bd. 1983); *Multiplex Communications, Inc.*, cited, *supra*.

35. Effectuation of the "best practicable service to the public" objective entails the appraisal of the proposed participation of the applicants' principals in the operation of the proposed station. It also includes such factors as efficient use of the proposed facility. The integration criterion is best measured through the aspect of ownership participation in the day-to-day operation of the station, a quantitative consideration subject to qualitative enhancement by such factors as the local residence of the principals, their participation in community organi-

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[110] Perry also is a director of the permittee of Station WDBY-FM, Duxbury, Massachusetts, a non-commercial station; has an option to purchase a 32% interest in the permittee of Station WVFR, Richfield, Connecticut and the right of first refusal with respect to Station WFHL(FM), Falmouth, Massachusetts.

[111] There would be no overlap of the primary service contours of the Amherst proposal with the other stations in which Perry has an interest.

zations in the proposed city of license and their previous broadcast experience.

36. Robert A. Morley, president, director and 25% stockholder of Hampshire proposes to be the full-time general manager of the proposed FM facility.[112] As general manager, Morley will oversee the programming, sales, business, engineering and public service activities of the station and will have general overall supervision of the station's operations. Morley has specifically committed himself to devote a minimum of 40 hours a week, five days a week, to the station's operations, and he has made adequate arrangements as to his other business interests so that this representation can be given credence by the Commission. Edward F. Perry, Jr., vice president, director and 50% stockholder of Hampshire, will work a minimum of eight hours a week relative to engineering and public affairs responsibilities.[113] Neither Morley, who has no broadcast experience, nor Perry is a resident of Amherst; nor have they been active in any local charitable or civic organizations in that community. The Amherst proposal, on the other hand, will involve Edward H. Peene, Jr., president, director and 50% stockholder, in the day-to-day operation of the station as general manager. He is presently the general manager of standard broadcast Station WTTT, licensed to the Town of Amherst, and has interests in restaurants in the area. However, nothing in this record undermines his proposal to devote a minimum of 40 hours a week to the operation of the FM station, and it is given credence. Peene is a local resident of Amherst, is active in a number of local civic organizations and has extensive broadcast experience. On the basis of the above, it is concluded that Amherst is superior relative to the aspect of integration of ownership and management and is accorded a moderate preference in this area of comparative evaluation.

37. Hampshire proposes to install an emergency power generator, while Amherst does not, and, as a result, Hampshire will be accorded a slight preference for its proposal relative to auxiliary power.

38. As detailed in the findings (paras. 156-159), Hampshire will serve more than twice the area and approximately three times the population proposed to be served by the Amherst proposal. However, there are a minimum of five primary aural broadcast services available to all of this

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[112] It is ruled that since it was reported prior to the cut-off date that Morley was to devote full time to the operation of the station, full credence will be given to his participation as general manager.

[113] Perry's 8 hours a week participation in station operation falls far short of the 20 hours a week minimum for award of partial integration. *WIDO, Inc.*, 92 FCC 2d 974, (FCC 83-367), released September 16, 1983. Accordingly, a "relatively slight part-time credit" is accorded to the Hampshire proposal because of this limited participation by Perry. *Greater Wichita Telecasting, Inc.* 90 FCC 2d 1046 (Rev. Bd. 1982); affirmed 92 FCC 2d 984, FCC 84-72, released March 15, 1984.

area. This fact, and the additional fact that Amherst will fail to serve a small portion of the city of Amherst, mandates the conclusion that a very slight preference is to be awarded to Hampshire in this area of comparative evaluation. *CJL Broadcasting, Inc.*, ____ FCC 2d ____, 54 RR 2d 1037 (1983).

39. Lastly, it is appropriate to consider the fact that Amherst proposes duplication of programming of its AM station, Station WTTT, for a period of 74 hours a week, representing 66.66% of its proposed FM station's broadcast week. Hampshire's proposal does not involve any program duplication. The Commission has made clear that whether an applicant proposing duplicated programming should be assessed a demerit, and the nature of that demerit, depends on the extent to which there are countervailing benefits deriving from the duplication and whether such duplication is comparatively insignificant *vis-a-vis* its opponent. *CJL Broadcasting, Inc., supra.* Since Hampshire proposes no duplication, it is ruled that the duplication here present is not insignificant. It is further ruled that Amherst has failed to set forth countervailing benefits derived from such duplication as to offset the inefficiency involved. The Commission, as a matter of policy, disfavors the use of two frequencies to bring a broadcast program to the same receiver location. *Jones T. Sudbury,* 8 FCC 2d 360, 10 RR 2d 114, 117 (1967) It is concluded that a moderate demerit must be assessed against Amherst because of its proposal to duplicate programming. *Radio Station WABZ, Inc.*, 90 FCC 2d 818 (Rev. Bd. 1982)

40. As noted in the conclusions, *supra,* a slight comparative demerit was assessed against Hampshire because of the submission of the inaccurate Morley affidavit relative to the Section 1.65 issue. Also, a slight demerit was assessed against Hampshire because of the failure to maintain the public file. However, an overall evaluation of the comparative strengths and weaknesses of these two applicants mandates the conclusions that Hampshire is the superior applicant, since it will result in diversification of the mass media, the paramount comparative factor. Stated simply, Hampshire's superiority relative to the diversification factor, in addition to its superiority in comparative coverage and efficient utilization of the facilities, plus its auxiliary power proposal, outweighs the preference accorded Amherst for its superior integration proposal.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with Section 1.276(d) of the Rules, 47 CFR 1.276(d)[114], the construction permit application of Hampshire County Broadcasting Co., Inc. for a new FM radio station on

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[114] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial

Channel 265A at Amherst, Massachusetts IS GRANTED and the application of Amherst Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

THOMAS B. FITZPATRICK, *Acting Chief Administrative Law Judge*

Decision shall become effective 50 days after its public release, pursuant to 47 CFR 1.276(d).

Antenna, Radiation Pattern
Application, Defective

Application for review denied. Low power television and television translator applicants proposing to use composite or custom directional antennas must submit specific radiation pattern data with their applications. A low power television applicant that failed to submit a composite antenna radiation pattern despite repeated opportunities will have its application returned as defective.
—*Katy Communications, Inc.*

FCC 84-536

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
Katy Communications, Inc.	File No. BPTVL-820430TB
For a Construction Permit for a New Low Power Television Station on Channel 10, Cabery, Illinois	

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1984; Released: November 16, 1984

BY THE COMMISSION:

1. The Commission has under consideration an Application for Review filed July 12, 1984, by Katy Communications, Inc. ("Katy"). Katy seeks review of the June 12, 1984, action of the Mass Media Bureau denying a Petition for Reconsideration and returning the above-captioned application as unacceptable for filing.

2. Katy filed its application for a new low power television station to serve Cabery, Illinois, on Channel 10, on April 30, 1982. Katy proposed to operate with two Scala (HDCA-10) antennas oriented at 350° and 250° respectively. However, the polar diagram of the horizontal radiation pattern which Katy submitted, Figure 3 of the application, did not accurately reflect this antenna configuration. It was the standard radiation pattern for a single antenna, rather than the correct composite

pattern showing the radiation from the two combined antennas.[1]

3. In the *Low Power Television Report and Order,* 51 RR 2d 476 (1982) (*"Report and Order"*), the Commission adopted a complete and sufficient standard for acceptance of low power television and television translator applications. Moreover, Section 73.3566 of the Commission's Rules, concerning defective applications, was applied to low power television and television translator applications. The Commission also provided for a 90-day amendment period to allow applicants to bring their applications into compliance with final low power television rules. One of the items to be provided during this amendment period was "a correct polar diagram, including the total polar plot . . .." *Report and Order,* 51 RR 2d at 504 n. 49. On June 23, 1982, the Commission released a *Public Notice,* 51 RR 2d 1275 (1982), announcing the time for the 90-day amendment period and again requesting "amendments of technical and nontechnical information required to render the application complete and accurate." Katy filed an amendment in response to the *Public Notice* on September 21, 1982, but did not submit a composite polar diagram.

4. Additionally, on October 1, 1982, the Commission issued a *Public Notice,* Mimeo No. 003, calling for the submission by November 1, 1982, of missing technical data from low power television applicants proposing directional antenna systems. This information was necessary in order to commence computer processing of the thousands of applications which had been filed. The notice stated that:

> Applicants proposing non-standard directional antenna systems must file actual radiation patterns, either in graphical or in tabular form. These non-standard antennas include both antennas that have been specifically designed for the applicant and composite antennas consisting of two or more "off-the-shelf" antennas. Because every composite and custom antenna generates a unique radiation pattern, specific radiation data must be filed by every applicant proposing a composite or custom directional antenna system. It is *not* adequate simply to submit the radiation patterns of each of the "off-the-shelf" antennas used in a composite antenna.

5. Again, by *Public Notice,* Mimeo No. 1230, released December 8, 1982, the Commission called for the submission by January 3, 1983, of specific technical data from all low power television applicants proposing directional antennas. This *Public Notice* also requested specific radiation data from all applicants proposing composite directional antenna systems. In spite of all these requests for data on composite antenna patterns, Katy failed to submit the required information prior to the return of its application by the staff. In fact, to this day, Katy has failed to submit the necessary composite antenna radiation pattern.

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[1] A composite antenna is made up of two or more antennas radiating maximum energy in different horizontal directions which in combination creates a unique horizontal radiation pattern that differs from the patterns of the antennas acting independently.

6. Because Katy had failed to submit the necessary directional antenna data, its application was processed by the Commission's computer as if it proposed omni-directional operation.[2] Based on this study, Katy's application was returned on December 14, 1983, due to prohibited signal contour overlap with authorized co-channel television station WTHI-TV, Terre Haute, Indiana.

7. On February 3, 1984, Katy sought reconsideration of the staff action claiming that there was no prohibited contour overlap with WTHI-TV and, thus, no objectionable interference would be caused. As part of Katy's petition for reconsideration it submitted an engineering exhibit which purported to show, in Figure 1, that no prohibited contour overlap would occur. This exhibit was apparently prepared based on the characteristics of the composite directional antenna. However, Katy again failed to provide the composite pattern or tabulations of the directional antenna.[3] Katy's application was defective and unacceptable for filing because it lacked the composite antenna radiation pattern which was necessary in order to process the application. Under the circumstances, the Bureau acted properly in returning Katy's defective application.

8. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the Application for Review filed by Katy Communications, Inc., IS HEREBY DENIED.

9. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail — Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[2] Without the necessary propagation information, the staff could only process the application assuming "worst case" interference parameters. This omni-directional analysis indicated a violation of the interference standards of Section 74.705 of the Commission's Rules. Alternatively, the staff could have returned Katy's application for failure to submit the necessary directional antenna data.

[3] When informed by a staff engineer that the application could not be processed without the composite antenna pattern, Katy merely resubmitted the radiation pattern of the "off-the-shelf" antenna used in its composite antenna. As Katy correctly notes in its application for review, it did not amend its application by submitting a new antenna radiation pattern.

Comparative Hearing
Issue, Rule 1.65
Remand
Reconsideration, Petition for, Grant of
Severance

Petition for reconsideration of Commission Order affirming Review Board's Decision, 55 RR 2d 23 (1983), denying petitioner's applications for AM and/or FM radio station granted in part and dismissed in part. AM applications severed from consolidated proceeding and remanded for further evidentiary hearings on reporting violation issue against winning applicant. Dismissed portion of petition repeated an argument already made and considered.

—*Merrimack Valley B/cing, Inc.*
BC Docket No. 80-28

FCC 84-496

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

Merrimack Valley Broadcasting, Inc. Nashua, New Hampshire	BC Docket No. 80-28 File No. BP-21, 101
	BC Docket No. 80-29 File No. BPH-10, 926
Sunrise Broadcasting Corp. Nashua, New Hampshire	BC Docket No. 80-30 File No. BP-21, 102
	BC Docket No. 80-31 File No. BPH-10, 925

Mario DiCarlo, Norman M. Kruglak, Augusta Hornblower and Ada Harkaway A Limited Partnership d/b/a Gateway Broadcasting Associates Nashua, New Hampshire	BC Docket No. 80-32 File No. BP-21, 103 BC Docket No. 80-33 File No. BPH-10, 928
Community Service Broadcasting of Nashua, Inc. Nashua, New Hampshire	BC Docket No. 80-35 File No. BPH-10, 927
For Construction Permits for new AM and/ or FM Stations to Replace the Deleted Facilities of Stations WOTW (900 kHz, 1 kW, D) and WOTW-FM (106.3 MHz, Channel No. 292) Nashua, New Hampshire	

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 1984; Released: October 23, 1984

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

1. The Commission has before it: (1) a Petition for Reconsideration filed November 14, 1983 by Merrimack Valley Broadcasting, Inc. (Merrimack), Partial Oppositions filed December 12 by Gateway Broadcasting Associates (Gateway) and Sunrise Broadcasting Corporation (Sunrise), and a Reply filed January 9, 1984 by Merrimack; and (2) a Contingent Request for Enlargement of the Issues Against Merrimack Valley Broadcasting, Inc. filed January 24, 1984 by Sunrise, an Opposition filed February 22 by Merrimack, and a Reply filed February 28 by Sunrise. Merrimack seeks reconsideration of a Commission Order which affirmed the Review Board's Decision denying Merrimack's applications for an AM and/or FM radio station at Nashua, New Hampshire.[1] The Commission Order also affirmed the grant of Gateway's mutually exclusive FM radio application and Sunrise's AM radio application and denied the mutually exclusive FM application of Community Service Broadcasting of Nashua, Inc. (Community).

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[1] *Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23 (1983), *affirming*, 92 FCC 2d 506 (Rev. Bd., 1982).

2. The parties had agreed that the best qualified applicant would receive the FM facility and the second best qualified would receive the AM facility. In an Initial Decision,[2] Assistant Chief Administrative Law Judge Thomas B. Fitzpatrick granted Merrimack's FM application and Sunrise's AM application. However, the Review Board concluded that the ALJ had given insufficient weight to Gateway's quantitative advantage for integration of ownership into management, as against Merrimack's qualitative advantages, such as local ownership. The Board, and the Commission, also reversed slight demerits imposed by the ALJ against Gateway and Sunrise for reporting violations. The Board preferred Sunrise over Merrimack based on very slight distinctions in the qualitative aspects of their integration proposals.

Petition for Reconsideration

3. With respect to the Gateway application, Merrimack reiterates an argument it previously made that Merrimack's largest owner is not entitled to integration credit because he does not intend to become a local resident and therefore, Gateway is not entitled to an integration preference over the locally owned Merrimack. A petition for reconsideration may not be used merely to repeat an argument already made and considered.[3] That portion of Merrimack's Petition will be dismissed.

4. According to Merrimack, new evidence demonstrates that Sunrise has violated Section 1.65 of the Commission's Rules[4] by not reporting that siblings of Sunrise's stockholders have acquired a television station in Merrimack, New Hampshire, which is adjacent to Nashua.[5] Merrimack asserts that ownership of the television and radio stations by members of the same family creates an undue concentration of media control in the Nashua-Merrimack area. Moreover, Merrimack asserts that this reporting failure in conjunction with previous reporting failures[6] establishes a pattern of carelessness and inattentiveness to the Commission's reporting

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[2] *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 523 (Admin. L.J. 1982).

[3] *See* Section 1.106(b) of the Commission's Rules. *See also WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

[4] Section 1.65 of the Commission's Rules requires an applicant to report within 30 days when information in an application is not substantially accurate and complete in all significant respects and to report other substantial changes in matters which may be of decisional significance. 47 C.F.R. §1.65.

[5] Sunrise is controlled by members of the Tamposi family. Barbara (24%) and Sam (23%) Tamposi are brother and sister; James Tamposi (23%) is their cousin. Celina Tamposi Mead and Stephen Tamposi, the brother and sister of Barbara and Sam, each own 25% of Golden Triangle TV 60 Corporation (hereinafter Golden Triangle), the licensee of the Merrimack, New Hampshire TV station.

[6] Sunrise's principals previously did not report certain business and financial interests because they believed the interests were irrelevant.

rules, warranting at least a comparative demerit. Merrimack points out that Sunrise previously failed to report some of its stockholder's business interests, including some held in common with the principals of the television station.

5. Sunrise responds that it had no obligation to report the acquisition of the television station by its principals' siblings, because it is not a significant fact. Sunrise argues that under Commission policy a familial relationship standing alone does not constitute common control relevant to the Commission's diversification or multiple ownership rules.[7] Sunrise also submitted an affidavit by its president stating that there will be no common control between the radio and television stations. Sunrise further contends that it had no motive to conceal the unreported information and that this single reporting failure cannot establish a pattern of carelessness or inattentiveness.

6. Merrimack replies that Sunrise has not fully disclosed the circumstances surrounding its failure to report the television application as required by the Commission. Additionally, Merrimack observes that Sunrise's principals had been specifically advised that the acquisition of broadcast interests by family members should be reported and further contends that sufficient indicia of common control between the television and radio stations exist to raise questions of decisional significance. Thus, Merrimack asserts that Sunrise has intentionally concealed a matter of decisional significance.

7. We will modify the issues and remand this case for exploration of Sunrise's most recent reporting failures.[8] The circumstances surrounding Sunrise's failure to report facts concerning the Golden Triangle application raise the question of whether Sunrise has been negligent or inattentive to our reporting rules or lacking in candor.[9] As Sunrise

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[7] *See Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981); *Alan K. Levin*, FCC 80-657, 45 Fed. Reg. 85512 (December 29, 1980); *1150 Broadcasting, Inc.*, 67 FCC 2d 197 (1977); *KTRB Broadcasting Co., Inc.* 46 FCC 2d 605, *recon. denied*, 48 FCC 2d 635 (1974).

[8] Merrimack implicitly asks us to reopen the record in this proceeding. Merrimack has met the test enunciated in, *e.g.*, *Stereo Broadcasters, Inc.*, 87 FCC 2d 87, 115 (1981). Sunrise asserts that Merrimack's Petition for Reconsideration is untimely because it was not filed within the time period specified by the Commission's Rules for enlarging the issues. *See* Section 1.229(b) of the Commission's Rules, 47 C.F.R. §1.229(b). However, with respect to Sunrise's failure to report the granting of the Golden Triangle application, Merrimack's Petition is untimely only by a few days. In view of this fact and the public interest in fully considering the ramifications of the new allegations, we will rule on the merits of the Petition.

[9] In our prior order in this case (*supra* note 1) we stated that inquiry into a reporting violation was justified only when a prima facie showing had been made that: (1) unreported interests are of decisional significance, (2) an intent to conceal is present, or (3) a pattern of carelessness or inattentiveness is present. As to the third prong of this test, we wish to make clear that circumstances surrounding a particular violation which

acknowledges, FCC Form 301, the application for a construction permit, explicitly requires the reporting of broadcast interests of family members.[10] Moreover, Sunrise's principals were put on notice of the importance of the Commission's reporting requirements by the prior scrutiny of their past reporting failures in additional hearing sessions in this proceeding. Furthermore, Sunrise's principals appear to have been specifically advised by counsel of the need to report the type of interest involved here,[11] a fact Merrimack has noted in its Petition for Reconsideration but which Sunrise has not addressed in its Opposition. While Sunrise's previous reporting failures were excused because of the mitigating circumstances present, the failure to report the filing and granting of the Golden Triangle application cannot be so condoned. In light of the prior warning and other factors mentioned above, Sunrise's most recent reporting failures raise not only a question of carelessness and inattentiveness but also the possibility that Sunrise has not been fully candid in dealing with the Commission. Inquiry into these matters in an evidentiary hearing is therefore warranted. Although, it is true that in the absence of common control the interests of family members are not taken into account for purposes of diversification or multiple ownership, the question turns on the specific facts and circumstances involved.[12] On the record before us we do not have a sufficient basis to raise a question of common control. If, however, facts developed under the Section 1.65 issue indicate otherwise, the Presiding Judge may, in his discretion, pursue this matter by adding an appropriate issue.

Contingent Request for Enlargement

8. In the event the Commission grants reconsideration, Sunrise seeks enlargement of the issues against Merrimack. Sunrise alleges that improper ex parte presentations to the Commission were solicited during the pendency of Merrimack's Petition for Reconsideration.[13] According to Sunrise, Davis P. Thurber, the husband of Merrimack stockholder and director, Patricia M. Thurber, sent letters to Vice President Bush and members of the New Hampshire congressional delegation, requesting them to aid Merrimack in obtaining reconsideration. Thurber's letters to the various governmental officials closes with the following language:

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indicate significant carelessness or inattentiveness may warrant inquiry even where no evidence of repeated violations is present. Accordingly, we revise the third factor as follows: (3) a pattern of repeated violations or other circumstances reflecting significant carelessness or inattentiveness is present.

[10] Question 19(b) of the 1977 Form 301, Section II, p. 5, filed by Sunrise, has been retained as Question 8(b) of the revised 1982 Form 301, Section II, p. 3.

[11] Tr. 2526-27.

[12] *Supra* note 7.

[13] *See* Sections 1.1221, 1.1225 of the Commission's Rules, 47 C.F.R. §§1.1221, 1.1225.

> The reason for this request is principally, that the full F.C.C. sustained Mr. Blumenthal[14] in this matter without granting a full hearing to all the parties. The attorney for the Merrimack group has requested such a hearing by filing a request for reconsideration. At the very least, the decision of Mr. Blumenthal overturning the Fitzpatrick decision,[15] which was based on four and a half years of proceedings, would be carefully reviewed by the F.C.C. I am only asking you to lend a hand in regards to obtaining a hearing. Everyone should then be perfectly willing to take their chances on the underlying merits of the proceedings.

More generally, Thurber's letters complain that the Board favored Gateway, which is controlled by out of state principals, over Merrimack, which is locally owned. Thurber elaborated his concerns in a cover letter sent to the Vice President. Vice President Bush's staff forwarded Thurber's letters to the Office of the Commission's Chairman, asking for a memorandum to be used as an enclosure to a reply. Congressman Judd Gregg wrote to the Commission's Director of Legislature Affairs.[16] Congressman Gregg wrote:

> I certainly hope that this mater will be given the Commission's every possible consideration and would hope that a hearing would be scheduled to allow all sides to present their cases.

Neither Thurber's letters nor the letters of Vice President Bush and Congressman Gregg was served on the other parties. Pursuant to Section 1.1241 of the Rules these letters were forwarded to the Commission's Managing Director for reply. The Managing Director made a prima facie determination that Thurber was an "interested person," within the meaning of Section 1.1201(e) of the Commission's Rules,[17] prohibited from making or soliciting ex parte presentations.

9. Merrimack responds that no ex parte issue should be added. Merrimack asserts that Thurber sought a full hearing for all of the parties and not intervention solely on Merrimack's behalf. Merrimack further asserts that Thurber did not request the government officials contacted to communicate with the Commissioners or other decision making personnel. Additionally, Merrimack submits that the government officials did not actually undertake to intervene on Merrimack's behalf, and that no ex parte contacts occurred because the letters of the government officials were forwarded to the Commission's Managing Director's Office.

10. Because the pleadings did not address the matter of whether Merrimack's principals solicited or had knowledge of Thurber's letters,

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[14] *I.e.*, the Decision of the Review Board, written by Member Blumenthal.

[15] *I.e.*, the Initial Decision of Assistant Chief Administrative Law Judge Thomas B. Fitzpatrick, which was reversed by the Board. *See* para. 2, *supra*.

[16] Congressman Gregg sent his letter to the Office of the Chairman. It was redirected to the Office of the General Counsel, in which the Director of Legislative Affairs actually serves.

[17] 47 C.F.R. §1.1201(e).

the parties were requested to file supplemental information.[18] Merrimack has submitted sworn statements by Thurber, Merrimack's president Joseph G. Sakey, and Merrimack's communications counsel. These statements declare that Thurber sent the letters on his own initiative and did not inform any of Merrimack's principals about the letters until after they had been sent. The statements further report that Thurber subsequently informed three of Merrimack's principals, including his wife, of the letters, but that they did not perceive the letters to be inappropriate.

11. Sunrise replies that Merrimack's principals were remiss in condoning Thurber's letters, by not alerting the other parties and in failing to repudiate the letters. Sunrise also contends that the statements tendered by Merrimack omit significant details such as the date on which Merrimack's principals learned of the letters and what discussions they had with Thurber.

12. In light of all of the circumstances, we will not add an ex parte issue against Merrimack. The sworn statements provided by Merrimack establish that its principals did not solicit Thurber's presentations and that they had no prior knowledge of them. Sunrise has presented no affidavits from persons with knowledge, or any other evidence to the contrary, and, thus, it would be mere conjecture and surmise to attribute the sending of the letters to any misconduct on the part of Merrimack's principals. Because no substantial and material question of fact has been presented concerning Merrimack's conduct in this proceeding, there is no reason for further inquiry with respect to this matter.[19] Thus, Sunrise's Contingent Request for Enlargement of Issues will be denied.

Conclusion

13. In view of the foregoing, we will remand this proceeding for additional hearings before the Administrative Law Judge and the issuance of a supplemental initial decision. These proceedings will include consideration of the new facts alleged by Merrimack. We will modify the Section 1.65 issue against Sunrise to encompass these new facts. We note that the grant of Gateway's above-captioned application for a new FM station at Nashua in this proceeding has been appealed to the United States Court of Appeals for the District of Columbia Circuit.[20] In order not to impede the initiation of new service to Nashua, we will sever the AM and FM proceedings so that judicial review of the FM grant can proceed. To avoid any possible prejudice to Community's hearing rights in

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[18] FCC 84I-45, released April 25, 1984. Merrimack filed a response on June 14, 1984 and Sunrise replied June 29, 1984.

[19] *Accord, New Continental Broadcasting Co.*, 93 FCC 2d 1275 (1983); 87 FCC 2d 517 (1981); *Western Communications, Inc.*, 40 FCC 2d 768 (Rev. Bd. 1973).

[20] *Community Service Broadcasting of Nashua, Inc.* v. *FCC*, No. 83-2166 (D.C. Cir. November 10, 1983).

case the Court of Appeals does not affirm the FM grant, Community may participate as a party in the remanded AM proceeding during the pendency of judicial review, although it is not an applicant for the AM station. Gateway will also remain a party to the AM proceeding.

14. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed November 14, 1983 by Merrimack Valley Broadcasting, Inc. IS GRANTED in part and IS DISMISSED in part; and that the Contingent Request for Enlargement of the Issues Against Merrimack Valley Broadcasting, Inc. filed January 24, 1984 by Sunrise Broadcasting Corporation IS DENIED.

15. IT IS FURTHER ORDERED, That the "1.65 Issue" IS MODIFIED to read as follows:

> To determine whether Sunrise Broadcasting Corp. timely disclosed the nature and scope of the business and financial interests of its principals, as required by Section II, Table II, of its applications and the broadcast interests of the immediate families of its principals as required by Section II, Question 19(b) in compliance with Sections 1.65 and 73.3514 of the Commission's Rules, 47 C.F.R. 1.65 and 73.3514, and if not, the effect of such failure on the basic and/or comparative qualifications of the applicant.

16. IT IS FURTHER ORDERED, That the above-captioned applications for a new FM radio station at Nashua, New Hampshire (File Nos. BPH-10,925-28) ARE SEVERED from this consolidated proceeding; and that Community Service Broadcasting of Nashua, Inc. and Gateway Broadcasting Associates MAY PARTICIPATE as parties in the AM proceeding during the pendency of judicial review of the FM proceeding.

17. IT IS FURTHER ORDERED, That this severed AM proceeding IS REMANDED for further evidentiary hearings as provided herein at a time and place to be specified in a subsequent Order, and that the Administrative Law Judge IS DIRECTED to issue a supplemental initial decision taking into account his additional findings and conclusions under the issue here remanded.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Administrative Law Judge, Authority of
Comparative Hearing
Misrepresentation
Ownership and Management, Integration of
Television Station, Authorization
Transmission, First Local

Review Board reversed *ID's* disqualification of applicant and granted its TV application. Evidence bared no misrepresentation of its "contingent" integration proposal; its edge in full-time quantitative integration (90% v. 79.2%) and qualitative enhancements (substantial minority ownership preference plus slight female ownership edge and solid broadcast experience preference outweighed local residence and civic participation disadvantage) carried the day.

—*Metro Broadcasting, Inc.*
MM Docket No. 83-140

FCC 84R-85

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Metro Broadcasting, Inc. Orlando, Florida	MM Docket No. 83-140 File No. BPCT-820707KE
Rainbow Broadcasting Company Orlando, Florida	MM Docket No. 83-142 File No. BPCT-820909KF
Winter Park Communications Winter Park, Florida	MM Docket No. 83-143 File No. BPCT-820909KV
For Construction Permit	

Appearances

John H. Midlen, Jr., on behalf of Metro Broadcasting, Inc.; *Barry D. Wood, Richard E. Wiley, John C. Quale, Antoinette D. Cook*, and *Jerry V. Haines*, on behalf of Rainbow Broadcasting Company; and *Robert J. Buenzle*, on behalf of Winter Park Communications.

DECISION

Adopted: November 23, 1984; Released: December 3, 1984.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS AND BLUMENTHAL. BOARD MEMBER BLUMENTHAL CONCURRING DUBITANTE AND ISSUING A SEPARATE STATEMENT.

BOARD MEMBER JACOBS:

1. This proceeding involves the mutually exclusive applications of Metro Broadcasting, Inc. (Metro), Rainbow Broadcasting Company (Rainbow), and Winter Park Communications (Winter Park) for authority to construct a new television broadcast station to operate on Channel 65. Metro and Rainbow propose Orlando, Florida as their community of license; Winter Park proposes the adjacent community of Winter Park. By Hearing Designation Order, 48 Fed. Reg. 10917, published March 15, 1983, these applications were designated for consolidated hearing to determine which proposal would best provide a fair, efficient, and equitable distribution of broadcast service pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), and on a contingent comparative issue.[1] By *Memorandum Opinion and Order*, FCC 83M-2102, released June 27, 1983, presiding Administrative Law Judge Walter C. Miller (ALJ) added a misrepresentation/lack of candor issue against Rainbow.

2. The Initial Decision (I.D.), FCC 83D-69, 90 FCC 2d 1073, released 12-21-83, disqualified Rainbow for misrepresenting decisionally significant facts in the ownership integration proposal it submitted on April 1, 1983, found no Section 307(b) preference to be warranted under the facts of this case, and granted Metro's application after concluding that it was an "overwhelming comparative winner" over Winter Park because of its "clear and decisive" integration preference and its "substantial" comparative engineering coverage preference.

3. The proceeding is now before the Review Board on exceptions filed by all of the applicants. The Board has reviewed the I.D. in light of the

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[1] In addition, the application of Harry D. Calhoun et al. d/b/a Orlando Family Television, Ltd. (File No. BPCT-820907KK) was designated for hearing. Subsequently, this application was dismissed by the ALJ, I.D., note 1. By *Memorandum Opinion and Order*, FCC 84R-5, 55 RR 2d 290 (Rev. Bd. 1984), released after the Initial Decision, we granted Orlando Family Television's appeal from its dismissal but remanded the proceeding to the ALJ to determine whether its application conformed with the multiple ownership rules. However, the ALJ subsequently dismissed with prejudice Orlando Family Television's application at its own request and reinstated the Initial Decision. *Memorandum Opinion and Order*, FCC 84M-2345, released May 17, 1984.

exceptions and reply briefs, the oral argument held September 26, 1984, and our examination of the record. We adopt the findings of fact and conclusions of law in the I.D., except as modified herein. Because we disagree with the I.D.'s disqualification of Rainbow and find Rainbow to be comparatively the best applicant, we reverse the I.D. and grant Rainbow's application.

4. *Misrepresentation.* The ALJ disqualified Rainbow for misrepresentation based on his finding that it failed to indicate in its April 1, 1983 integration showing submitted to the ALJ that the participation of Leticia Jaramillo (a 10% partner) as proposed full-time program manager was secondary to her inconsistent proposal made in another proceeding to serve as full-time general manager of a station at Sacramento, California. I.D., Findings, paras. 5-18; Conclusions, paras. 2-7. In its exceptions, Rainbow urges the Board to overturn its disqualification because its April 1, 1983 integration proposal was accurate when made and at the time of the hearing, and remains unchanged today. Only during a brief period after the proposal was submitted to the ALJ on April 1 and before the commencement of the hearing on August 22, according to Rainbow, did it consider Jaramillo's Orlando integration proposal to be contingent upon her Sacramento proposal. Also, Rainbow points out that on April 28, the date it filed its integration proposal in the Sacramento proceeding, it filed a petition for leave to amend in the instant case which revealed its contingent Sacramento integration plans. Metro and Winter Park reply that Rainbow's disclosure of its intentions concerning the Sacramento proposal was belated and incomplete and that Rainbow lacked candor when it omitted from its April 1 submission in this proceeding any reference to its inconsistent intentions to be integrated at the Sacramento station.

5. A chronological review of the key facts is enlightening. In its application as originally filed on September 9, 1982, Rainbow disclosed that its principals Joseph Rey (85% owner) and Leticia Jaramillo (10%) also were 10% and 90% owners, respectively, of El Dorado Television Company (El Dorado), which on August 24, 1982 had filed a television broadcast application for a new station at Sacramento, California. Rainbow FCC Form 301, Exh. 1 (official notice taken). On November 5, 1982, Rainbow amended its Orlando application to state that its principals "plan to be actively involved in the management of the [Orlando] station on a day-to-day basis." The Sacramento and Orlando proceedings were designated for hearing on February 22 and March 15, 1983, respectively. By *Order Prior to Prehearing Conference*, FCC 83M-940, released March 22, 1983, the ALJ directed each party to the Orlando proceeding to submit within 10 days a written integration proposal. Rainbow's response on April 1, 1983 indicated that each of its principals would be integrated fulltime (40 hours

per week) into station management roles: Rey as general manager, Jaramillo as program manager, and Esperanza Rey-Mehr (5% owner) as director of Hispanic affairs. Winter Park Special Issue Exh. 3.

6. However, on April 28, 1983, El Dorado responded to a similar order of the presiding officer in the Sacramento proceeding by filing an integration statement that referenced the Orlando integration proposal and committed Rey and Jaramillo to be full-time integrated principals at Sacramento if Rainbow's application were unsuccessful. I.D., Findings, para. 16; Winter Park Special Issue Exh. 1. It further stated that, although Rey's Orlando integration commitment was to "take precedence" over his Sacramento proposal, Jaramillo's commitment to Orlando was secondary to her promise to serve as full-time general manager of the proposed Sacramento station. *Id.* In this latter respect, El Dorado stated:

> [S]hould the Orlando application be granted prior to, or within three years following the initiation of the operation of the Sacramento station, Ms. Jaramillo will transfer her interest in Rainbow Broadcasting Company to Joseph Rey, and will have no management role at the Orlando facility.

Id. (In addition, Rey would divest his interest in El Dorado upon grant of a construction permit for the proposed Orlando station. *Id.*) Also on April 28, Rainbow filed a petition for leave to amend which, in addition to reflecting a change of address for Ms. Jaramillo, clarified its Orlando integration proposal:

> The Rainbow application reflects that its partners, Leticia Jaramillo and Joseph Rey, are also partners in El Dorado Television Company, which is one of ten applicants for a construction permit on Channel 29 in Sacramento, California. El Dorado is now engaged in settlement negotiations in which it has offered to dismiss its application in exchange for reimbursement of its prosecutorial expenses. However, if those negotiations fail and the El Dorado application is eventually granted, Ms. Jaramillo will serve as the fulltime general manager of the Sacramento station, and will transfer her interest in Rainbow Broadcasting Company to Joseph Rey. In that event, she will terminate her integration commitment with respect to the Orlando station. Mr. Rey has also proposed to serve in a fulltime management role at the Sacramento station, but only to the extent that such involvement would not interfere with his commitment to serve as the fulltime general manager of the Orlando station. In the unlikely event that both applications are granted, Mr. Rey will divest his interest in El Dorado Television Company. El Dorado's Statement for the Record on these matters is being exchanged today in the Sacramento proceeding.

Winter Park Special Exh. 2; Tr. 691-694. The ALJ granted the petition only insofar as it reported the address change, but denied Rainbow's attempt to clarify its integration proposal. *Order*, FCC 83M-1648, released May 18, 1983. Subsequently, he granted a motion to enlarge issues filed May 16, 1983 by Winter Park and added an issue to determine whether Rainbow's April 1, 1983 integration proposal contained misrepresentations or was lacking in candor. FCC 83M-2102, *supra*.

7. At hearing, Rainbow principals Rey and Jaramillo were examined extensively with respect to both the omission from the April 1, 1983

integration statement of any reference to their plans to personally manage the Sacramento station and their failure to disclose that, if the Rainbow application were granted within three years after initiation of operation of the Sacramento station, Ms. Jaramillo then would transfer her Rainbow ownership interest to Rey and would abandon the proposed Orlando station. See Tr. 650-888. They explained that in applying for the Sacramento and Orlando construction permits they were seeking ultimately to obtain one station at which they both could work together. Tr. 695-97, 760-61, 853, 877-78. A few days after filing the Sacramento application on August 24, 1982, they realized that a total of twelve applicants were vying for that one station and, consequently, their chances in a comparative hearing were slim. Tr. 696, 704, 761-62, 852-53. The Orlando application was then filed on September 9. In February 1983, after their engineering consultant informed them that the Sacramento application had a transmitter site problem, each of them believed that that application would most likely be dismissed through settlement at some future time and they focused their attentions on their Orlando application. Tr. 728-33, 801-02, 852-53. In response to the ALJ's March 22, 1983 Orlando order requiring a written submission of their integration plan, FCC 83M-940, *supra,* Rey engaged in "frantic" phone calls with counsel and his partners and formulated the integration proposal, involving full-time participation by all three principals, that was submitted April 1, 1983. Tr. 674, 778-82, 873-74. The Sacramento proceeding was not discussed during these telephone conversations and was not on Rey's and Jaramillo's minds at this time since they still assumed that the Sacramento application would shortly be dismissed through settlement. Tr. 727-28, 735, 781-83, 866.

8. Although the Sacramento presiding officer had ruled on April 15, 1983 that a written integration plan had to be filed by April 28, Rey first became aware of this fact on April 27. Rey was unable to reach Jaramillo and developed by himself the proposal that was submitted on April 28 and which he regarded as a "hypothetical" or "academic exercise" because he believed that the Sacramento application would soon be dismissed. Tr. 675-77, 782-91, 808, 812-13, 850-51, 869. Both Rey and Jaramillo were proposed for full-time management roles at the Sacramento station, but Rey's participation was made secondary to his Orlando integration promise. See para. 6, *supra.* However, Jaramillo's Sacramento participation proposal was given priority over her Orlando plan in the event that the Sacramento application were granted. *Id.* Rey subsequently spoke with Jaramillo who orally ratified this integration plan, but who also believed the Sacramento submission to be "hypothetical" because negotiations were underway to achieve a settlement and dismissal of the application. Tr. 677-78, 700-04, 736-40, 746, 800. The condition that Jaramillo would abandon the Orlando

station should that application be granted "within three years following the initiation of the operation of the Sacramento station" was apparently inserted on advice of counsel to avoid a potential "trafficking" violation[2] and was regarded by Rey as a "legal technicality" that he did not understand. Tr. 794-96, 805-07. Also, in his April 27 conversation with counsel, Rey suggested that the ALJ in the Orlando proceeding be informed of the Sacramento submission, and counsel proposed that the information be supplied with the change of address amendment he was going to file the next day. Tr. 789, 876-77. This was done — the ALJ and the other parties were informed of Jaramillo's formal primary integration pledge to Sacramento — but the three-year contingency was inexplicably omitted. See para. 6, *supra*. In their direct written testimony, notarized on July 27 and 28, 1983, respectively, Rey and Jaramillo did not indicate that their proposals to participate fulltime in Rainbow's station management were in any manner contingent upon the outcome of the Sacramento proceeding. Rainbow Exhs. 1, 2, 4. However, they testified that in preparing these exhibits they regarded the Sacramento application as dismissed because a settlement agreement had been reached in June and revised slightly and reexecuted in July. Tr. 754-55, 843-45. The settlement agreement was filed in the Sacramento proceeding on July 29, 1983, and shortly thereafter the presiding officer formally approved the agreement and dismissed the El Dorado application. *Trefoil Broadcasting Co., Inc.*, FCC 83M-2657, released August 11, 1983.

9. Based on the preceding review of the record evidence, we hold that the ALJ erred in disqualifying Rainbow. A finding of disqualifying misrepresentation or lack of candor requires evidence of a willful intent to deceive, mislead, or conceal. *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137, 50 RR 2d 1321, 1325 (Rev. Bd. 1982), *modified*, 93 FCC 2d 127, 129, 53 RR 2d 44, 46 (Comm'n 1983). *See also Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 723, 54 RR 2d 989, 996 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 551, 55 RR 2d 424 (Rev. Bd. 1984); *Garrett, Andrews and Letizia, Inc.*, 86 FCC 2d 1172, 1177, 49 RR 2d 1001, 1005 (Rev. Bd.), *modified on other grounds*, 88 FCC 2d 620, 50 RR 2d 802 (Comm'n 1981). We find no evidence of such wrongful intent here. In departing from the

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[2] Section 73.3597(a) through (d) of the Rules, 47 CFR 73.3597(a)-(d), formerly comprised the "three-year rule" which required an application for broadcast license assignment or transfer submitted prior to completion of a three-year holding period to be designated for hearing unless specified extenuating circumstances were present or a waiver petition was found to be meritorious. *Transfer of Broadcast Facilities*, 52 RR 2d 1081, 1082 (1982). However, effective December 14, 1982, this rule, and its underlying policy against "trafficking" in broadcast licenses, was eliminated by the Commission and in its place a one-year holding period after commencement of operation was imposed on those who obtain a permit as a result of a grant through comparative hearing. *Id.* at 1086, 1089; 47 Fed. Reg. 55924.

ALJ's determination that Rainbow principals Rey and Jaramillo intentionally misrepresented Jaramillo's management role and concealed their inconsistent Sacramento integration proposal (I.D., Findings, paras. 9, 18, and note 7; Conclusions, paras. 6-8 and note 18), we are not unmindful that the Commission is "generally reluctant to overturn the credibility determinations of an ALJ unless his findings are patently in conflict with the record evidence." *Country Broadcasting Company*, 93 FCC 2d 83, 88, 53 RR 2d 293, 297 (Rev. Bd. 1983); *accord*, *Old Time Religion Hour*, *supra*, 95 FCC 2d at 722, 54 RR 2d at 996. Here, however, the ALJ has made no adverse demeanor findings and has not found the testimony of Rey or Jaramillo to lack credibility; without any solid evidentiary support for his conclusions he has, we believe, mischaracterized the import of their testimony and drawn erroneous inferences of fact.

10. Thus, for instance, we cannot uphold the ALJ's determination (I.D., Findings, para. 18) that

> Rey and Jaramillo took the position that the misrepresentation was made to Judge Kuhlmann [the Sacramento presiding officer] and not to the Orlando Presiding Officer, but that it was all right to be less than candid with Judge Kuhlmann, since they intended to dismiss the Sacramento application in any event.

We can find no record support for this conclusion, and we believe it mischaracterizes their record testimony that they viewed their Sacramento integration proposal as "hypothetical" (because they were negotiating a settlement agreement which would result in the dismissal of the Sacramento application) but would nevertheless implement that integration proposal in the unlikely event that the application were granted. See para. 8, *supra*. Contrary to the ALJ's implication, there is no evidence to suggest that El Dorado would not have carried out its integration commitment had its application not been dismissed.[3] Other findings by the ALJ in like vein, *e.g.*, that Mr. Rey was "well aware that he has been less than candid with the Commission" (I.D., n. 7), that "Mrs. Jaramillo misrepresent[ed her] role . . . in Rainbow" (I.D., note 18), and that Rainbow "dissembled" (I.D., Cncls., para. 6) and "misrepresented" (*id.*, para. 7) are also entirely conclusory and simply lack factual support.[4] We are therefore obliged to perform "our statutory duty to act in the public interest" by rejecting these findings which are "patently in conflict" with the record evidence. *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1045, 24 RR 2d 369, 381 (1972); *see Lorain Journal Co.* v. *FCC*, 351 F. 2d 824, 828 (D.C. Cir. 1965).

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[3] In addition, the ALJ's finding (I.D., Findings, para. 9) that Rey and Jaramillo knew at the time they filed Rainbow's application on September 9, 1982 that they would have to file an integration proposal in each market is not supported by Rey's testimony at Tr. 673, upon which it is purportedly based. Instead, the totality of the testimony reveals their state of mind on the date in question to be primarily focused on prosecuting Rainbow's Orlando proposal because they viewed the El Dorado Sacramento application as having only a remote chance of being granted. See para. 7, *supra*.

[4] We also note the ALJ's findings that "no legal partnership" was ever formed for El Dorado and was not formed for Rainbow until the hearing was underway, I.D., nn. 4 and 5. These findings are without any decisional importance because they neither support the ALJ's lack of candor conclusions nor reveal any legal defect in the applicant Rainbow. *Cf. High Sierra Broadcasting, Inc.*, 56 RR 2d 1394, 1396 (Comm'n 1984). Indeed, no issue

11. Instead, we find that the uncontroverted record evidence (see paras. 5-8, *supra*) shows a complete absence of any intent by Rainbow or its principals to conceal their ownership integration plans or to deceive or mislead the Commission in this regard. Any potential motive to conceal its principals' Sacramento plans in order to achieve some tactical advantage at the Orlando hearing is not supported by even one evidentiary shred. Through 238 pages of hearing testimony (Tr. 650-888), Rey and Jaramillo adhered consistently to their explanation that the April 1, 1983 Orlando integration pledge was submitted to the ALJ without any thought of filing an intentionally inconsistent proposal in Sacramento, which they considered largely hypothetical in any event because of the expected settlement; and, on April 28, when Rey filed the Sacramento plan which modified the Orlando submission, Rainbow immediately informed the Orlando ALJ of that modification as well as of the specifics and basic contingencies pertaining to both proposals.[5] Also, Rainbow's omission in its April 28 statement of the three-year Jaramillo contingency plan appears inadvertent and unintentional, particularly since her contingent commitment to Sacramento was spelled out otherwise.[6] In these circumstances, no more than a slight comparative demerit against Rainbow could possibly be warranted — and then only for its principals' carelessness or inattentiveness in not realizing earlier, *i.e.*, at the time they submitted their April 1, 1983 integration plan, the need to delineate their Sacramento proposal which, when finally put together and submitted, contained contingencies and weakened their Orlando proposal. *See Merrimack Valley Broadcasting, Inc.*, FCC 84-496, released October 23, 1984, at note 9; *compare Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 947, 50 RR 2d 1142, 1145 (Rev. Bd. 1982) (no demerit assigned for an inadvertent

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pertaining to legal qualifications was specified with regard to either the El Dorado or Rainbow application.

[5] These facts contrast sharply with *Old Time Religion Hour, supra*, 95 FCC 2d at 722-23, 54 RR 2d at 996, where testimonial lack of candor was evidenced by changes in explanations and by inconsistencies, confusion, and convenient lack of recall of recent events.

[6] In any event, the three-year contingency is not decisionally significant. Because Jaramillo's proposed Orlando integration as revealed here on April 28, 1983 was made secondary to her Sacramento proposal and, thus, contingent on the actual dismissal of the Sacramento proposal, Rainbow can receive no credit for her proposed participation in station management—even without reference to the "three-year" proviso. See para. 22, *infra*.

omission of a decisionally insignificant matter) *and Town and Country Radio, Inc.*, 70 FCC 2d 572, 575-6, 44 RR 2d 149, 153-54 (Rev. Bd. 1978) (minor demerit for unintentional but careless reporting violations) *with Radio Station WABZ, Inc.*, 90 FCC 2d 818, 827, 51 RR 2d 1507, 1515 (1982), *aff'd sub nom. Victor Broadcasting, Inc.* v. *FCC*, 722 F. 2d 756 (D.C. Cir. 1983) (moderate demerit for numerous reporting violations reflecting "an inattention to . . . reporting requirements"). However, as we recently discussed in *The Gene Sudduth Co., Inc.*, 56 RR 2d 1326, 1328 (Rev. Bd. 1984) (Separate Statement *En Banc*), Commission procedures for considering "contingent" applications and "contingent" integration proposals are far less than pellucid. Consequently, we cannot ultimately fault Rainbow for what we perceive to be a sincere and reasonably prompt, if imperfect, attempt to make full disclosure of the contingent Orlando-Sacramento integration plans of its principals. Accordingly, we will not assess Rainbow a comparative demerit.

12. *Section 307(b) Issue.* Metro and Rainbow propose Orlando, Florida as their community of license; the applicant Winter Park proposes to serve the contiguous community of Winter Park. I.D., Fdgs., paras. 22, 27. Orlando is a major city in east central Florida, has a 1980 population of 127,662, and is served by Orlando International Airport and by two major nationwide bus lines, a railroad, and several motor and freight carriers. *Id.*, para. 23. It is a major tourist center, has its own mayor and city council, has a labor force of about 70,000 people, and has a major daily newspaper and four weeklies. *Id.*, paras. 24-25. Orlando has twelve AM and FM radio stations and four television stations licensed to it. *Id.*, para. 26.

13. Winter Park is an integral part of the Orlando urbanized area, abuts the city of Orlando, and has a 1980 population of 22,339. *Id.*, para. 27. The center of Winter Park is less than 5 miles from the center of Orlando, and the two communities are served by a common local bus system. *Id.*, paras. 23, 27. Winter Park has its own mayor and city council, has a labor force of 12,000 people, and has a weekly newspaper, *Id.*, paras. 28-29. Although Winter Park has four AM and FM radio stations licensed to it, it has no local television station. *Id.*, para. 30. The ALJ, relying on *Cleveland Television Corp.*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *review denied*, FCC 83-235, released May 18, 1983 (Comm'n), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984), and *Buena Vista Telecasters of Texas, Inc.*, 94 FCC 2d 625, 54 RR 2d 562 (Rev. Bd. 1983), held that although Winter Park nominally proposed a first local television station while Metro and Rainbow proposed a fifth such outlet, no applicant merited a Section 307(b) preference in this proceeding. I.D., Cncls., paras. 9-10.

14. In its exceptions, Winter Park urges that it should have been awarded a decisive Section 307(b) preference for proposing a first local

television service to Winter Park. It stresses that its Exhibit 9 establishes firmly that Winter Park is a separate city from Orlando, having different demographic characteristics and needs, and should therefore be preferred under the mandate of Section 307(b). Winter Park further claims that *Cleveland Television, supra,* does not bar it from obtaining a decisive Section 307(b) preference simply because its proposed community is smaller than and adjoins Orlando, the community proposed by its competitors. We disagree.

15. Initially, we point out that Winter Park's strenuous effort to demonstrate that its proposed community of license is a city independent politically, sociologically, and to some extent economically from Orlando, Winter Park Br. at 25-35, is inadequate to establish *simpliciter* that it should be preferred for proposing a first local *television* station there. In fact, the Commission's previous licensing of AM and FM broadcast stations to the city of Winter Park demonstrates clearly its recognition of that city as a separate community entitled to its own local *radio* transmission outlets. Instead, the focus must be on whether a Section 307(b) choice should be made here in the context of a comparative *television* proceeding. That determination, in turn, depends on the concept of "community" as it applies in television cases. For, as the Commission has long recognized:

> [T]he concept of communities within the meaning of Section 307(b) has not been limited to municipalities, but in any given case has been determined by a combination of circumstances. The type of facility sought, the coverage each applicant would provide and the location and importance of the municipality in relation to nearby cities and towns have been among the factors considered in determining the applicability of 307(b). See *Huntington Broadcasting Co.v. FCC,* 192 F.2d 33, 7 R.R. 2030; *Rossmoyne Corp.,* 7 R.R. 117; *Huntington Broadcasting Co.,* 5 R.R. 721; *Pawtucket Broadcasting Co.,* 4 R.R. 1345. In cases involving mutually exclusive applicants from a principal city and a contiguous suburb, it has been held that where both applicants propose to serve substantially the same areas and populations the term "communities," as used in this section of the Communications Act, is not limited in meaning to "municipalities" but may include metropolitan areas.

St. Louis Telecast, Inc., 22 FCC 625, 712-13, 12 RR 1289, 1369 (1957), *quoted in Cleveland Television, supra,* 91 FCC 2d at 1136, 52 RR 2d at 587. In *Cleveland Television,* a proceeding involving a choice between television applicants proposing Cleveland, Ohio or the contiguous suburb of Shaker Heights as their principal community of license, we held that metropolitan Cleveland was in reality the one large community being applied for, and we awarded no Section 307(b) preference to either applicant. 91 FCC 2d at 1137, 52 RR 2d at 587. Our conclusion followed from analyzing the economic and allocation policy differences between the television and aural broadcast services:

> Television stations, unlike radio, are not divided into classes depending on the size of their coverage areas, and the allocations scheme for television (Sixth Report and

> Order, [41 FCC 148, 167 (1952)]) specifically provides for central cities with large populations to have multiple channel assignments. . . Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues. Beyond these differences, the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes "should be defined in terms of coverage and not in terms of artificial political boundaries." *Evening Star Broadcasting Co.*, 27 FCC 2d 316, 321 n. 4, 20 RR 2d 1311, 1321 n. 3a (1971), *aff'd sub nom. Stone v. FCC*, 466 F. 2d 316 (D.C. Cir. 1972). Therefore, television stations — unlike FM broadcast stations — are generally considered as providing "an areawide, rather than a localized service." *St. Louis Telecast, Inc., supra*, 22 FCC at 713, 12 RR at 1369.

Id.

16. We affirm the ALJ's refusal to award a Section 307(b) preference here. The preceding case excerpts make clear that *Cleveland Television* is firmly rooted in established Commission and court precedent, and we agree with the ALJ that its rationale squarely controls the facts of the instant case. Winter Park is a small city abutting Orlando, which is more than five times its size. All three applicants will place a Grade B signal over the metropolitan Orlando area, including the city of Winter Park. Jt. Engineering Exh. 2; Winter Park Exh. 10. Each will serve over 1 million persons. I.D., Fdgs., para. 19. Under these circumstances, the economic need of a television station to attract sizeable advertising revenues to cover the significant costs involved in its ongoing operation creates a strong presumption — unrebutted in this record — that each applicant will serve the entire Orlando metropolitan area. We therefore will not award a Section 307(b) preference to Winter Park. *See Cleveland Television, supra*; *cf. Buena Vista Telecasters of Texas, supra* (television applicants for Garland and Richardson, Texas, approximately 1/7th and 1/12th the size of neighboring Dallas, held to be applicants for the metropolitan Dallas-Fort Worth urbanized area and therefore neither would merit a §307(b) preference).[7]

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[7] We also reject Winter Park's assertion (Br. at 35) that it should receive a preference for its allegedly "unusually good programming service to all those *receiving* service from the station." *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 810 n.5, 51 RR 2d 409, 416-17 n.5 (Rev. Bd. 1982), *review denied*, FCC 83-368, released September 15, 1983, *appeal pending*, D.C. Cir. No. 83-2067, filed October 11, 1983, citing *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955) which "precludes the consideration of proposed programming evidence in a Section 307(b) case." The proper focus of a needs showing is on the need of a proposed community of license for a local outlet, not on the uniqueness or excellence of a proposed program service *per se. Central Broadcasting Co.*, 3 RR 2d 594 (Rev. Bd. 1964). Winter Park also states that the ALJ impermissibly relied on the rulemaking assignment of the contested channel to Orlando rather than Winter Park as a reason for denying it a Section 307(b) preference. The rulemaking in this case, however, did not foreclose the subsequent Section 307(b) determination, *see WHW Enterprises*, 89 FCC 2d at 811 n.6, 51 RR 2d at 417 n.6; *Campbell and Sheftall*, 7 FCC 2d 658, 9 RR 2d

17. *Contingent Comparative Issue: Diversification.* The ALJ awarded no preference to any applicant for diversification of control because he found that none held any attributable media interests. I.D., Fdgs., paras. 34-35; Concls., paras. 13-14. This determination accurately reflects the record evidence and, because no exception to it has been lodged by any applicant, it is final. 47 CFR 1.277(a).

18. *Comparative Coverage.* The ALJ found that Rainbow would provide a fourth television service to 5,323 people in 247 square miles (sq. mi.) and a fifth service to 239,148 people in 1,190 sq. mi.; Metro would provide a fourth service to 4,747 people in 196 sq. mi. and a fifth to 238,764 persons in 1,095 sq. mi.; and Winter Park would render a fifth service to 103,395 people in 510 sq. mi. I.D., Fdgs., para. 20. Also, Rainbow would serve overall 1,476,047 people in 8,105 sq. mi.; Metro, 1,443,470 people in 7,598 sq. mi.; and Winter Park, 1,116,211 people in 5,893 sq. mi. *Id.*, para. 19. The ALJ determined that Rainbow deserved a slight comparative coverage preference over Metro and that both of these applicants, in turn, merited a substantial preference over Winter Park. *Id.*, para. 21; Concls., para. 12. We will reduce the comparative coverage preference awarded Metro and Rainbow over Winter Park to a slight to moderate one because, although their fourth and fifth services and overall coverage are substantially greater, they will not provide a first or second reception service to anyone. *See Christian Broadcasting of the Midlands, Inc.*, 57 RR 2d 87, 91-92 (Rev. Bd. 1984), and cases cited therein. As between Rainbow and Metro, we find that the minor coverage differences are too insubstantial to merit any preference. *Cf. Alessandro Broadcasting Company*, 56 RR 2d 1568, 1571-72 (Rev. Bd. 1984) (minor reception advantages too insignificant to provide a meaningful Section 307(b) preference).

19. *Integration of Ownership and Management.* The ALJ awarded Metro 99% credit for proposing the full-time participation of five individuals who each own 19.8% of its voting stock: Arthur Grindle, general manager; William C. Coleman, Jr., director of programming and operations; James W. Hickman, director of finance; Elmer Neal Lincoln, director of sales; and David L. Peoples, director of public affairs and community relations. I.D., Fdgs., paras. 36-59; Concls., para. 15. Grindle is a civically-active long-term resident of the proposed service area and has some broadcast experience. He is also a member of the Florida House of Representatives, which meets at least two months per year. Coleman is a long-term Orlando resident, participates some in civic affairs, and has some broadcast experience. Hickman is a longterm service area resident with some civic activity. Lincoln lived in the service area from 1975-83, will

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999 (Rev. Bd. 1967), and the ALJ's holding was largely predicated on the cases cited at para. 13, *supra*.

return to Orlando if Metro's application is granted, and is a Black male. Peoples has lived in the service area since 1974 and in 1983 moved to Orlando; he is civically active. The ALJ found that Rainbow would integrate full time Joseph Rey, an 85% general partner, as general manager, and Rey's mother, Esperanza Rey-Mehr, a 5% general partner, as director of Hispanic affairs; he rejected as inconsistent with her Sacramento integration pledge the proposed integration of Leticia Jaramillo, a 10% general partner, as full-time program manager. I.D., Fdgs., paras. 12, 60-68. Mr. Rey will move to Orlando if Rainbow's application is granted; Mrs. Rey-Mehr has been an Orlando resident since 1978. Both are Hispanic and, of course, Mrs. Rey-Mehr is female. Mr. Rey has significant past broadcast experience. Winter Park, in turn, was credited only for the part-time (20 hours per week) integration of Hal H. Kantor, a 10% stockholder, as general manager. *Id.*, paras. 69-71. Mr. Kantor has been an Orlando resident since 1972 and has some civic involvement. The ALJ did not compare Rainbow's integration proposal with those of its opponents but did award Metro a "clear and decisive" overall integration preference over Winter Park. *Id.*, Concls., para. 15.

20. In their exceptions, Rainbow and Winter Park challenge Metro's ability to effectuate its 99% full-time integration proposal. We disagree with this contention except as it relates to Metro principal Arthur Grindle, as will be discussed at paragraph 21, *infra*. First, we reject Rainbow's claim (Br. at 32-33) that Metro stockholder James Hickman's full-time integration commitment is unreliable because of an alleged conflict in his testimony as to how many hours per week he is currently working. Tr. 390-426. Hickman essentially stated that he had recently begun cutting back sharply his commitments to time-consuming projects that could have interfered with his ability to work at the station, reaffirmed his intention to work at least 40 hours per week in station management, but also indicated that he was a "workaholic" who "had been working a 40 hour week for a long time." In short, Hickman's testimony is fully consistent with, and supportive of, his integration pledge, and will therefore be credited. Second, Rainbow claims (Br. at 33-34) that Metro principal Elmer Lincoln will not be able to effectuate his full-time integration proposal principally because of his current time-consuming involvement in his automobile dealership. We reject this contention because of his unrefuted commitment to turn complete control over the management of that business to his recently hired general manager trainee and, should this arrangement prove unsatisfactory, to sell the business. Metro Exh. 8 at 3; Tr. 287. Similarly, we deny as unsupported by the record evidence Winter Park's broad assertion (Br. at 46, 47-48) that the current business interests of Metro principals William Coleman, David Peoples, and James Hickman make their integration proposals unlikely to be effectuated. *See*

Central Texas Broadcasting Co., Ltd., 90 FCC 2d 583, 585-589, 51 RR 2d 1478, 1480-483, *recon. denied*, 92 FCC 2d 94, 51 RR 2d 1383 (Rev. Bd. 1982), *review denied*, FCC 83-415, released September 21, 1983, *recon. denied*, FCC 84-73, released March 15, 1984, *appeal pending sub nom. Blake-Potash Corp.* v. *FCC*, No. 83-2112 (D.C. Cir., filed October 21, 1983).

21. Nevertheless, we believe that some reduction in Metro's integration credit is in order for Arthur Grindle's proposed participation as general manager. As Rainbow (Br. at 31) and Winter Park (Br. at 46-47) contend, the uncontroverted record evidence shows that Mr. Grindle, as a member of the Florida House of Representatives with several subcommittee assignments, will have to spend two months per year at the state capital, Tallahassee. I.D., Fdgs., paras. 40, 43-44 and n. 14. Because the Commission emphasizes that ownership participation in management is most meaningful when rendered on a full-time and day-to-day basis and that credit given for it drops sharply to the extent time spent moves away from full time, *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395, 5 RR 2d 1901, 1909 (1965), we shall award Metro part-time credit only for Grindle's integration because of his necessary public commitment to be absent two months a year from the station. *See Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 950-51, 50 RR 2d 1142, 1147 (Rev. Bd. 1982) (applicant awarded part-time credit only for proposed 40-hour per week management participation of owner who will take three to four month vacations every year). In total, Metro is credited with 79.2% full-time plus 19.8% part-time quantitative integration.[8]

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[8] We also have considered and now reject:

(a) Rainbow's attack (Br. at 24-26) on Metro's integration based on the collateral integration promises of its principals made in the Cape Coral, Florida television proceeding. Metro's principals have testified here that their Orlando commitments take precedence over their Cape Coral pledges. Tr. 290-93, 368. *See* para. 25, *infra.*

(b) Rainbow's description (Br. at 26-30) of Metro's corporate structure, which involves voting and non-voting classes of stock, as a "sham." It has failed to specifically allege or show that Metro's stockholders vote in percentages that vary from their actual ownership as revealed on the "B" cut-off date. Its allegation that non-voting stockholders attend stockholder meetings does not establish that they actually vote or have otherwise retained the right to vote. Under the facts of this case, the ALJ properly based his award of integration credit on the amount of voting stock owned. *See Bradley, Hand and Triplett*, 89 FCC 2d 657, 662, 51 RR 2d 383, 387 (Rev. Bd. 1982).

(c) Winter Park's claim (Br. at 43-45) that Metro and Rainbow should receive no integration credit because their proposals were submitted after the "B" cut-off date in this proceeding. Because both the old and the new versions of the application form, FCC Form 301, do not expressly call for an applicant's complete integration proposal, Commission practice has been to permit such proposals to

22. Rainbow also avers (Br. at 21-24) that the ALJ erroneously struck its Exhibit 2 which contains Ms. Jaramillo's testimony that she will be integrated full time at the proposed Orlando station. Rainbow points out that her testimony indicates unequivocally that she will fulfill her Orlando integration commitment and that the collateral Sacramento application filed by El Dorado, to which she had on April 28, 1983 nominally pledged her primary managerial loyalty, was dismissed on August 11, 1983, prior to commencement of this hearing. See paragraphs 5-6, 8, *supra*. Therefore, Rainbow seeks additional 10% quantitative integration credit which corresponds to Ms. Jaramillo's ownership share. Although we do not believe that the ALJ should have stricken her written testimonial exhibit, we nevertheless affirm the ALJ's conclusion not to credit Rainbow for Ms. Jaramillo's proposed integration. During the time period begining April 28, 1983 when Ms. Jaramillo first proposed primary fealty to Sacramento and August 11 when the El Dorado application was dismissed, her integration commitment to Orlando was stated to the Commission to be secondary to her Sacramento pledge. Moreover, she testified in this proceeding that if the settlement in Sacramento had failed and El Dorado's application been granted, she would have fulfilled her pledge to serve as general manager at Sacramento and cancelled her alternative plan to be Rainbow's program manager. See paragraph 8, *supra*; Tr. 703-04, 740-41, 752-53. In other words, her Orlando plans were made contingent on the dismissal of the El Dorado application, an event which Rainbow could have prevented by simply opting not to enter into the subsequent settlement agreement. That Rainbow voluntarily chose another course does not render her proposal any less "conditional and uncertain" than the one rejected by the Board in *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 431, 55 RR 2d 627, 634 (Rev. Bd. 1983), *review denied*, 56 RR 2d 1394 (1984). Accordingly, as in *High Sierra*, we shall award no credit for such a contingent integration proposal. We therefore award 90% full-time quantitative credit to Rainbow for the proposed participation of Joseph Rey and Esperanza Rey-Mehr.[9]

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be filed at the hearing. *See WHW Enterprises, supra* note 7, 89 FCC 2d at 817, 51 RR 2d at 421; *cf. Vacationland Broadcasting Co., Inc.*, 55 RR 2d 1299, 1304 (Rev. Bd. 1984) (in the future, applicants must specify precise hour-per-week integration proposals in direct written cases), *recon. denied*, 56 RR 2d 1260. *But see* note 9, *infra*.

[9] We also reject Rainbow's exception (Br. at 22-23 n. 13) to the ALJ's *Order*, FCC 83M-940, *supra*, requiring the applicants to submit their integration proposals prior to commencement of the hearing. Rainbow attacks this ruling as "impermissible compulsory discovery." We disagree. Although the Board has permitted information not called for by the application form to be first supplied at hearing in an applicant's direct written case, *see WHW Enterprises, supra*, we specifically approve of the procedure employed here as a proper exercise of the ALJ's plenary authority pursuant to Section 1.243 of the Rules,

23. *Integration Summary*. Metro has been credited with 79.2% full-time plus 19.8% part-time quantitative integration credit; Rainbow, 90% full-time credit; and Winter Park, 10% part-time only credit. Both Metro and Rainbow are therefore awarded substantial preferences over Winter Park which has no full-time credit and cannot overcome its overwhelming quantitative deficit with qualitative enhancements. *See Cleveland Television, supra*, 91 FCC 2d at 1141, 52 RR 2d at 590; *New Continental Broadcasting Company*, 88 FCC 2d 830, 850, 50 RR 2d 1117, 1133 (Rev. Bd. 1981), *remanded on other grounds*, 93 FCC 2d 1275, 53 RR 2d 1004 (Comm'n 1983). There is thus no need to consider further Winter Park's enhancement credit. Rainbow is quantitatively ahead of Metro, and while its 10.8% advantage is probably a "clear" enough difference to be decisional, *see New Continental, supra* (12.5% differential is "clear"), we conclude that it is also ahead qualitatively. In particular, Rainbow is awarded a substantial preference for minority participation by 90% of its stock ownership (Mr. Rey and Mrs. Rey-Mehr) in contrast with Metro's 19.8% credit for Mr. Lincoln. *See Waters Broadcasting Corporation*, 91 FCC 2d 1260, 1264, 52 RR 2d 1063, 1067 (1982), *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984). It also receives a solid broadcast experience preference because the past broadcast experience of its 85% principal Mr. Rey is much more significant and attaches to larger ownership than that of Metro principals Coleman (19.8% owner participating full time) and Grindle (19.8%, part-time). Finally, it is very slightly ahead on female ownership participation (5% for Mrs. Rey-Mehr v. 0% for Metro). *See KIST Corp.*, 57 RR 2d 49, 65 (Rev. Bd. 1984). On the other hand, Metro is awarded a moderate preference for superior local residence and civic participation because of (a) the long-term local residence of Mr. Coleman as further enhanced by his involvement in some civic activity; (b) the long-term service area residence of Mr. Hickman as further enhanced by his involvement in some civic activity; (c) the moderate-term service area and short-term local residence and civic activity of Mr. Peoples; and (d) the moderate-term service area and

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47 CFR 1.243, to regulate the course of the hearing. *See Wind River Communications, Inc.*, 55 RR 2d 579 (Rev. Bd. 1984); *see also Ruarch Associates*, 56 RR 2d 1593, 1595 n. 3 (Rev. Bd. 1984); *Service Electric Cable TV, Inc.*, 37 FCC 2d 119, 122 n. 14, 25 RR 2d 135, 139 n. 14 (Rev. Bd.), *aff'd*, 37 FCC 2d 583, 25 RR 2d 595 (Comm'n 1972). We believe that the comparative hearing process is improved when the presiding officer issues a formal order that requires all the applicants to submit complete, written statements of their principals' ownership participation plans, including their precise hour-per-week commitment to station management, their proposed roles, and a complete itemization of all qualitative enhancement credits claimed. Such a prehearing submission provides all parties with information needed to assess their comparative chances of prevailing at hearing and thereby not only expedites matters but also encourages earlier settlements and lessened litigation.

proposed future residence of Mr. Lincoln. In addition, it receives slight additional credit because its 19.8% part-time participating principal, Mr. Grindle, is a civically-active local resident. By comparison, Rainbow is credited for the proposed future residence of an 85% owner, Mr. Rey, and the local residence since 1978 of a 5% owner, Mrs. Rey-Mehr. The size of Metro's preference is less than maximal largely because less than half (39.6%) of its full-time participating ownership has long-term residence, either locally or in the service area, and only half of that amount represents residence that is truly local. *See Policy Statement*, 1 FCC 2d at 396, 5 RR 2d at 1910 (Commission prefers longer term residence); *Waters Broadcasting Corporation, supra*, 91 FCC 2d at 1263, 52 RR 2d at 1066 (service area residence "closely follows" in importance local residence). We conclude that, although the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage and solid broadcast experience preference, somewhat outweighs Metro's local residence and civic participation advantage. *Cf. Phoenix Media Corp.*, 56 RR 2d 1241, 1249-50 (Rev. Bd. 1984). Therefore, based on its quantitative and qualitative edge, we award Rainbow a slight overall integration preference over Metro. *See New Continental Broadcasting Co., supra.*

24. *Auxiliary Power*. The ALJ rejected Metro Exh. 4 and Rainbow Exh. 5 which proposed auxiliary power, because he was aware of no precedent awarding such a preference in television cases. Tr. 98-104; 656-57. Based on our recent decisions in *San Joaquin Television Improvement Corp.*, 96 FCC 2d 594, 604, 54 RR 2d 1206, 1214 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 617, 55 RR 2d 1186 (Rev. Bd. 1984), and *Minority Broadcasters of East St. Louis, Inc.*, 56 RR 2d 275, 283 (Rev. Bd. 1984), which applied the Commission's *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966), to television cases, we overturn the ALJ's rulings and award Metro and Rainbow slight auxiliary power preferences over Winter Park. In so doing, we reject Rainbow's claim that Metro should receive no preference because it first proposed auxiliary power in its direct written case, which was filed considerably after the "B" cut-off date in this proceeding. As has long been the case with integration proposals, see notes 8 and 9, *supra*, the application form now no longer expressly requests auxiliary power information.[10] Therefore, Metro properly filed its proposal as part of its direct case. However, we point out that an ALJ, pursuant to his plenary authority to regulate the course of the hearing may require that auxiliary power as well as integration proposals be submitted at an earlier

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[10] Formerly, auxiliary power equipment had to be listed in the application item requiring a listing of costs for technical equipment.

time. *See* notes 8 and 9, *supra*. Because no such requirement was set forth in the instant case, Metro's proposal was timely.

25. *Motion to Enlarge Issues.* Winter Park excepts (Br. at 37-41) to the ALJ's *Memorandum Opinion and Order*, FCC 83M-3715, released October 19, 1983, which denied its August 31, 1983 motion to enlarge issues. Winter Park had sought the addition of reporting and misrepresentation/lack of candor issues against Metro because it did not timely report in this proceeding the filing by its principals of an application for a television station at Cape Coral, Florida. The ALJ denied the motion because he found that Metro's failure to report was inadvertent, that the Cape Coral application reported the pendency of the instant Orlando application, and that Metro voluntarily disclosed the existence of the Cape Coral application when it exchanged its hearing exhibits in this case. *Id.* We deny Metro's exception because the record reveals no intent by Metro or its principals to conceal, deceive, or mislead; the Cape Coral application has proven to be decisionally insignificant here, *see* note 8, para. (a), *supra*; and there is no pattern of repeated violations or other circumstances reflecting the presence of significant carelessness or inattentiveness. *See Merrimack Valley, supra.* In any event, enlargement of the issues at this stage would be pointless because Metro is not comparatively the best applicant here.

26. *Conclusions.* All decisionally significant exceptions have been considered. Rainbow has been found to be basically qualified and no applicant has been awarded a preference under Section 307(b) or under the comparative factor of diversification of control. Rainbow has been given a slight integration preference over Metro, and both of these applicants have been awarded substantial integration, slight to moderate comparative coverage, and slight auxiliary power preferences over Winter Park, which therefore "shows" in third place. As between Rainbow and Metro, Rainbow's slight integration preference, based on both its quantitative and qualitative advantages, is sufficient to carry the day. *See New Continental, supra.* We therefore conclude that a grant of the Rainbow application will best serve the public interest, convenience, and necessity.

27. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed June 25, 1984 by Rainbow Broadcasting Company IS GRANTED, and the amendment IS ACCEPTED; and

28. IT IS FURTHER ORDERED, That the application of Rainbow Broadcasting Corporation (File No. BPCT-820909KF) for a new commercial television station at Orlando, Florida IS GRANTED, and the applica-

tions of Metro Broadcasting, Inc. (File No. BPCT-820707KE) and Winter Park Communications (File No. BPCT-820909KV) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

Concurring *Dubitante*

Because, as the majority accurately observes at paragraph 11, *ante*, our recent statement attending *The Gene Sudduth Co., Inc.*, 56 RR 2d 1326, 1328 (Rev. Bd. 1984), explains that our policy on "contingent" ownership integration proposals is amorphous and, hence, may have even invited some of the mischief narrated in paragraphs 4-11 of the *Decision*, I would not disqualify this winning applicant (Rainbow) for its pluck. On the other hand, I do not accept all of the findings and conclusions of the majority which tend to envelop the winning applicant's actions in miasma of guileless ignorance, nor do I join the characterizations, in the literal sense, of the ALJ's rulings relating to that applicant's maneuvers. (*See ante* paras. 9-10.) The ALJ's vigilance was salutary.

As ventilated in the *Gene Sudduth* appendix, the problem of "contingent" integration proposals is burgeoning; and the fact that it has taken the majority 6 pages to here unscramble Rainbow's clues as to its probable intentions is a testament to the emergent brain-twister "Proviso" which — like "Trivial Pursuit" — has spawned a jolly constituency. Just one, but far from unitary, example of how this frisky pastime operated in this single case is illustrated as follows. The dual Rainbow principals jointly filed virtually contemporaneous applications for a pair of widespread television channels, the first in Sacramento, California, the second in Orlando, Florida. Fulltime integration was, at various points, pledged by *both* principals at *both* stations. When forced to declare by the two different ALJs in the respective TV proceedings, one of the Rainbow principals (Rey) was depicted in an application amendment in the following Butterfly Straddle:

> Mr. Rey has also proposed to serve in a fulltime management role at the Sacramento station, but only to the extent that such involvement would not interfere with his commitment to serve as the fulltime general manager of the Orlando station.

See ante para. 5 Paragraphs 4-11 of the *Decision* are enlivened by similar hedgehopping by the second Rainbow principal (Jaramillo). We are told by Rainbow — in later testimony — that one of the apparently inconsistent integration pledges was, by that time, " 'hypothetical' or 'academic exercise.' " (*See ante* para. 8.) Probably, but why was that fact not clearly spelled-out at the time of the pertinent filings?[1]

While we recently sought the Commission's assistance on this matter of "contingent" proposals in *Gene Sudduth*, it falls, perhaps, to the Board — the agency's appointed first line of review — to lay down the law (at least tentatively) so as to discourage the unchecked growth of such pestilence. Short of barring "contingent" — and certainly "hypothetical"[2] — integration proposals, a rather inflexible remedy,[3] I would urge:

1. That *no* credit be given to any integration pledge that is contingent on the outcome of another pending application (the outcome of which cannot be known for certain until all *certiorari* appeals are exhausted)[4];
2. That any "contingent" integration proposals be timely spelled out in *all* relevant proceedings, *particularly* the priorities, and that any ambiguities be construed most strongly against the propositioning party; and
3. That any patently inconsistent integration proposals on file at the same moment be considered a disqualifying misrepresentation.

License applicants have been long admonished that: "As a licensing authority, the Commission is not expected to 'play procedural games with those who come before it in order to ascertain the truth.'" *RKO General v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1982) (citation and subsequent history omitted). Some applicant, soon, may become the victim of the fatal lack of candor finding so narrowly eluded by the peripatetic applicant here.

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[1] The answer is as obvious as it is cynical: Rainbow (by its California alter ego, El Dorado) sought to maintain its "hypothetical" integration pledge in Sacramento for as long as it could get away with it so as to extract a larger settlement for dismissal of the El Dorado application. *See generally ante* para. 8.

[2] Maintenance of any "hypothetical" integration proposals should be regarded as abuse of process.

[3] This strict remedy has recently been set down by the Commission to apply when "contingent" applications would be *prima facie* inconsistent with our multiple ownership rules. *See Gene Sudduth*; *William H. Hernstadt*, 56 RR 2d 948 (M.M. Bur. 1984). The Media Bureau has wisely indicated that it would not waste the public's time and money, nor that of competing applicants, by processing "contingent" applications, only one of which can be granted as prosecuted.

[4] The Board has properly applied that principle in this case. *See ante* note 6 and para. 22.

Common Carrier, Costs, Allocation of
Common Carrier, Interstate
Equipment Costs

Section 69.303(c) of Rules amended which governs the allocation of station equipment investment between the special access and common line elements in the access charge plan. Amended rules requires exchange carriers to allocate Category 5 station equipment investment based on the relative number of equivalent lines in use, but excludes from that allocation formula special access lines that are exempt from the special access surcharges as provided in Section 69.115(e) of Rules. (Phase I).
—*MTS/WATS*
CC Docket No. 78-72

FCC 84-545

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
MTS and WATS Market Structure	CC Docket No. 78-72, Phase I

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1984; Released: November 14, 1984

BY THE COMMISSION:

1. In the *Third Report and Order* in this docket (*Access Charge Order*),[1] we adopted rules governing the process by which local telephone

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[1] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983), *modified on reconsideration*, FCC 83-356, 48 Fed. Reg. 10319, 54 RR2d 615 (released August 22, 1983) (*First Reconsideration Order*), *further modified on reconsideration*, FCC 84-36, 49 Fed. Reg. 7810, 55 RR2d 785 (released February 15, 1984) (*Second Reconsideration Order*), *aff'd in part, remanded in part, Nat'l Assn. of Regulatory Comm'rs. v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *Petition for cert. pending*, 53 U.S.L.W. 3070 (filed July 18, 1984).

BY THE COMMISSION:

companies are to recover the costs of their facilities and services used in the origination or termination of interstate and foreign telecommunications.[2] Since that time we have twice amended these "access charge" rules in orders on reconsideration. In response to the *Second Reconsideration Order*, numerous parties have petitioned for further reconsideration of these rules. One of the issues raised in this third reconsideration round concerns the allocation of Category 5 station equipment investment between the switched and special access categories. Because of actions we are taking today with respect to the special access tariffs, immediate resolution of this issue is necessary to allow exchange carriers to file revised tariffs that properly reflect the costs associated with the various types of private lines.

2. In our companion order in the access tariff proceeding,[3] we find the proposed special access tariffs unlawful and direct the exchange carriers to file revised tariffs by December 3, 1984, with a scheduled effective date of January 17, 1985. We do not anticipate acting on all the issues raised in the third reconsideration round in this docket (*i.e.* No. 78-72) before the revised tariffs must be filed. Accordingly, we have split the third reconsideration in this docket into two parts. The first part of the reconsideration, embodied in this Order, addresses the issue of the allocation of Category 5 station equipment costs to the special access category. The second part will address the remainder of the issues raised in the third reconsideration round.

I. Further Reconsideration Petitions

3. Western Union argues that section 69.303(c) of the access charge rules results in an improper assignment of Category 5 station equipment[4]

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[2] The separations rules govern the apportionment of local telephone company investment and expense between the interstate and the intrastate jurisdictions. These rules are set out in Part 67 of the Commission's Rules. *See Amendment of Part 67 and Establishment of a Joint Board,* CC Docket No. 80-286 (Decision and Order), FCC 83-564, 49 Fed. Reg. 7934 (released February 15, 1984).

[3] *Investigation of Access and Divestiture Related Tariffs,* CC Docket No. 83-1145, Phase I and Phase II, Part I, FCC 84-524, adopted November 8, 1984.

[4] Under the separations rules, Category 5 station equipment includes all station equipment not specifically assigned to other categories, *i.e.,* equipment that is not used to provide teletypewriter exchange, private line, station identification, or wideband services. Section 67.152 of the Commission's Rules. Thus, Category 5 includes ordinary message station equipment, as well as station equipment used jointly for both special services and message telephone services (*e.g.* PBXs and keysets). *Id.* at § 67.151(b)(3). While the current separations rules provide that "surrogate" customer premises equipment and inside wiring are treated separately from Category 5 equipment (*See* § 67.151(a)(1), (2)), the access charge rules provide for the apportionment of such investment among access elements pursuant to the formula governing Category 5 investment provided in section 69.303(c). *see* §§ 69.303(d) (surrogate CPE), 69.401(b) (inside wiring). Accordingly, for purposes of our discussion here, Category 5 station equipment includes surrogate CPE

costs to specialized private lines (such as telex lines) that make no use of that equipment.[5] Pursuant to the rule, investment in Category 5 station equipment is apportioned between the special access and common line elements on the basis of the relative number of equivalent lines in use.[6] Western Union asserts that since section 69.303(a) of the rules directly assigns the cost of Category 2 private line station equipment to special access, specialized private lines are already bearing the cost of associated station equipment, and a proportional assignment of message equipment investment based on a count of those same lines is improper. As a result, it argues, the special access revenue requirement is being inflated through the over-assignment of station equipment investment.

4. Western Union further asserts that this result does not reflect our original intent in promulgating section 69.303(c) in the *Access Charge Order*. The rule at that time divided investment in Category 5 station equipment between the common line and dedicated access elements. The dedicated access category included WATS access lines and private lines that terminate in a PBX, a key system, or similar equipment.[7] Thus, under the original 69.303(c), investment in Category 5 station equipment was to be allocated only to those lines that actually use such equipment. Furthermore, at that time the special access category included only those private lines that were connected to equipment that was used exclusively for private line services (*i.e.*, that could not be used for message telephone services). The investment in this "Category 2" station equipment[8] was, and still is, directly assigned to the special access element under section 69.303(a). When in the *First Reconsideration Order* we eliminated

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and inside wiring connected to equipment used (wholly or in part) for message telephone service.

[5] Western Union Petition at 3-4. On January 24, 1984, after the close of the pleading cycle in the second reconsideration round and shortly before we adopted the *Second Reconsideration Order*, Western Union submitted a Petition for Clarification and/or Further Rulemaking in this docket, asking us to clarify or amend section 69.303(c) along the lines it has suggested in its petition in this third reconsideration round. Dow Jones & Company, Inc. and Pacific Bell and Nevada Bell submitted responsive pleadings. In its reconsideration petition, Western Union referenced this rulemaking petition in its argument that section 69.303(c) should be amended. Accordingly, since we are continuing to refine our access charge rules through the reconsideration process, we have elected to treat the rulemaking petition as part of Western Union's petition for reconsideration and incorporate it and the responsive pleadings into the record of this reconsideration round.

[6] Equivalent lines are computed on the basis of bandwidth. For example, a special access line having twice the bandwidth of a normal voice line would be counted as two lines. *See* Section 69.303(c) of the Commission's Rules.

[7] *First Reconsideration Order* at para. 50. The term "dedicated access line" was defined as "a WATS access line or a private line that does not terminate in customer premises equipment that is used exclusively for a particular interexchange carrier." *Access Charge Order* at App. A.

[8] *See* section 67.152(b) of the Commission's Rules.

dedicated access as a separate category and merged it into special access,[9] we amended section 69.303(c) by simply substituting the term "special access" for "dedicated access" in the allocation provisions of that rule. Western Union complains that by this substitution we (perhaps inadvertently) have made private lines that make no use of message station equipment subject to an allocation of the costs of that equipment. It asks us to restrict the private lines counted for the purposes of the apportionment in section 69.303(c) to those lines originating or terminating in Category 5 equipment.

5. Dow Jones supports Western Union's arguments and suggests that one solution to the problems would be to limit the special access lines subject to section 69.303(c) to those lines subject to the $25 special access surcharge.[10] AT&T and SBS also support Western Union's position.[11] Pacific objects to the proposed rule change on the grounds that: (i) special access is often a close substitute for message service and should bear the cost of message equipment; and (ii) in any event, the problem is a temporary one because station equipment is being phased out of the separations process.[12] Pacific also questions whether the Commission should consider proposals to change the rule because the issue was not raised in the second reconsideration round pleadings.

II. Discussion

6. Because Western Union asks us to reconsider a provision of the access charge rules promulgated in the *First Reconsideration Order*, we must initially address the procedural status of its petition. As we explained in the *Second Reconsideration Order*, in order to bring finality to our decision making process and to eliminate uncertainty, we adopted section 1.429(i) of our rules, which provides:

> The Commission may grant [a] petition for reconsideration in whole or in part or may deny the petition . . . Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious.

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[9] The original access charge plan included usage-sensitive end user charges up to a maximum, and the dedicated access line charge was used to establish that maximum. When we eliminated end-user usage charges in the *First Reconsideration Order*, there no longer was a need for a maximum end-user charge, and we therefore decided to eliminate the dedicated access category and combine it with the special access category. *First Reconsideration Order* at para. 52.

[10] Dow Jones (Rulemaking) Comments at 1-6. Dow Jones proposal would have the effect of eliminating from the section 69.303(c) allocation formula those private lines that are not connected to equipment capable of being used for message telephone services. *See* section 69.115(e) of the Commission's Rules.

[11] AT&T Opposition at 22; SBS Petition at 12-15.

[12] Pacific (Rulemaking) Opposition at 4-5.

47 C.F.R. § 1.429(i). We relied on this rule in the *Second Reconsideration Order* to deny requests that we reconsider certain aspects of the access charge plan adopted in the *Access Charge Order* that the *First Reconsideration Order* left intact. But as we recognized in the *Second Reconsideration Order*, section 1.429(i) is permissive and not mandatory.[13] It authorizes us to deny such requests as untimely and repetitious, but does not compel us to do so if we find that on balance it would better serve the public interest to address those requests on their merits. In the present case, we elect to address the request for reconsideration made by Western Union because of the substantial policy issues it raises regarding the apportionment of net investment between special and switched access.

7. We conclude that the arguments raised by Western Union and others that the formula in section 69.303(c) results in an inappropriate allocation of costs to special access are meritorious.[14] That formula allocates investment in Category 5 station equipment based on the relative numbers of switched lines and private lines, including in the latter category private lines that do not terminate in Category 5 equipment. We agree with Western Union that as a result there is an over-allocation of investment in Category 5 station equipment to special access, which raises the special access revenue requirement. We also agree that this result is not consistent with our intent in originally promulgating the rules for the apportionment of station equipment investment in section 69.303. Accordingly, we will adopt the suggestion of Dow Jones and revise the 69.303(c) formula to provide that only those lines to which the special access surcharge applies should be counted for the purpose of allocating investment in Category 5 station equipment.[15]

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[13] *Second Reconsideration Order* at 140.

[14] But we do not agree with certain arguments raised by SBS concerning section 69.303(c). SBS questions "whether the Commission intended for . . . [the] surcharge on special access lines to be in addition to the new rule allocating station equipment investment to special access . . . or in lieu of this allocation process." SBS Petition at 12. SBS states that the surcharge alone should satisfy the Commission's concerns about private lines that terminate in a PBX or PBX-like device, and it asks the Commission to clarify its intent in this regard. The short answer to SBS' request for clarification is that it was our intent that both rules apply to special access lines. The rules serve different purposes—allocation of station equipment costs among different types of lines that use that equipment and recovery of local network costs from private lines with the capacity to "leak" interstate traffic into the local exchange. Neither rule is a substitute for the other.

[15] Western Union indicates that while it would prefer a broader exemption, the Dow Jones proposal would provide an acceptable solution. Western Union (Rulemaking) Reply at 5-6. And Pacific, while opposing any amendment to 69.303(c), states that if a change is to be made, it supports the Dow Jones proposal. Pacific (Rulemaking) Opposition at 5-6.

8. We recognize that in our *First Reconsideration Order*, we declined to amend section 69.303(c) to reflect the changes made here.[16] We gave three reasons for that decision. First, we stated the problem was simply a transitional one because the interstate CPE costs would gradually disappear over four years pursuant to the CPE phaseout plan.[17] Second, we indicated that even if we were to limit the private lines included in the section 69.303(c) allocation process to those that use Category 5 equipment, the result would not be a precise cost-causational allocation because, for example, many end users with a private line connected to PBX a may not have used a telephone company PBX for years. Third, we indicated that under our special access rules exchange carriers could solve the problem by not assessing users of specialized private line services the costs of unrelated Category 5 station equipment. However, we no longer find these reasons convincing for maintaining the rule in its present form. With respect to our last reason, we now know that the exchange carriers have not solved the problem under their proposed special access tariffs.[18] And the parties have persuaded us that neither the transitional nature of the problem, nor the fact that as a practical matter no rule will achieve a perfect match between costs and customers, is a good reason not to amend the rule to achieve a better match for that transition, particularly one that is consistent with our initial intent in promulgating the rule in the *Access Charge Order*. Accordingly, we will amend section 69.303(c), as indicated above, so that special access lines that do not utilize Category 5 station equipment do not have to bear its costs.[19]

III. Ordering Clauses

9. Accordingly, IT IS HEREBY ORDERED, That pursuant to 47 U.S.C. §§ 154(i) and (j), 201, 202, 203, 205, 218, 403 and 405 and 5 U.S.C. § 553, the *Second Reconsideration Order* adopted in this proceeding is modified to the extent set forth in this *Memorandum Opinion and Order*.

10. IT IS FURTHER ORDERED, That the petitions for further reconsideration or clarification of Section 69.303 of the Commission's Rules are granted to the extent set forth in this *Memorandum Opinion and Order*, and are otherwise denied.

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[16] *First Reconsideration Order* at para. 53.

[17] *See* Amendment of Part 67 (Decision and Order), CC Docket No. 80-286, 89 FCC 2d 1, *as modified*, 90 FCC 2d 52 (1982).

[18] Western Union (Rulemaking) Petition at 4.

[19] The amended rule appears at Appendix A. The mechanism for recovering these costs appears in *Special Access Tariff Order* at paras. 69-70. In that Order, we direct that the costs allocated to the special access tariff element, pursuant to Section 69.303(c), be recovered by charges on those lines subject to the special access surcharge.

11. IT IS FURTHER ORDERED, That the Petition for Clarification and/or Further Rulemaking submitted by Western Union, together with its associated, responsive pleadings, is incorporated as part of the record in this reconsideration round.

12. IT IS FURTHER ORDERED, That Part 69 of the Commission's rules is amended as set forth in Appendix A, effective on the day following publication in the *Federal Register*. We find good cause for requiring an effective date earlier than thirty days following publication in the *Federal Register*. This good cause arises from the need for telephone companies to file tariffs for special access services by December 3, 1984, to be effective on or before January 17, 1985, that are based on the access charge rules as revised by this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix A

Section 69.303 is amended to read as follows:

Section 69.303. Station equipment.

. . .

. . .

(c) Investment in all other station equipment shall be apportioned between the Special Access and Common Line elements on the basis of the relative number of equivalent lines in use, as provided herein. Each interstate or foreign Special Access line, excluding lines designated in Section 69.115(e), shall be counted as one or more equivalent lines where channels are of higher than voice bandwidth, and the number of equivalent lines shall equal the number of voice capacity analog or digital channels to which the higher capacity is equivalent. Local exchange subscriber lines and WATS access lines shall be multipled by the interstate separations factor for non-traffic sensitive plant to determine the number of equivalent local exchange subscriber lines and the number of equivalent WATS access lines.

Private Operational-Fixed Microwave Service Reconsideration, Petition for, Denial of

Petitions for reconsideration of *First Report and Order*, 86 FCC 2d 299, denied. Licensees in Private Operational-Fixed Microwave Service (OFS) permitted to distribute their products/services to their customers in all boards allocated for OFS. Earlier decision modified by designating two-year period during which licensees in OFS will be precluded from using facilities to deliver video entertainment material in bands other than those above 21.2 GHz.
—*Operational-Fixed Service*
Docket No. 19671

FCC 83-245

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Various methods of transmitting program material to hotels and similar locations and Use of the Business Radio Service for the transmission of motion pictures or other program material to hotels or other similar points.	Docket No. 19671

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1983; Released: June 23, 1983

BY THE COMMISSION: COMMISSIONERS DAWSON AND RIVERA CONCURRING IN THE RESULT; COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER SHARP ABSENT.

I. Introduction

1. On May 7, 1981, the Commission adopted a *First Report and Order* in this proceeding,[1] which amended our rules to allow eligibles in the

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[1] *First Report and Order*, Docket No. 19671 (FCC 81-216), released May 15, 1981, 86 FCC 2d 299, 46 *Fed. Reg.* 27953 (May 22, 1981).

Private Operational-Fixed Microwave Service (OFS)[2] to operate private local distribution radio systems to deliver products to their customers.[3] The new rules permitted licensees to distribute to their customers such products as motion pictures and music, or services such as computerized information. These systems could be either fixed point-to-point or point-to-multipoint uses. Three channels in the 2.5 GHz band were made available for point-to-multipoint transmissions while other available OFS bands were designated for point-to-point transmissions.

2. In reaching our decision in the *First Report and Order*, we recognized that there was a need for frequencies to distribute program material and other products which could not be transmitted over the broadcast, common carrier, or cable television relay spectrum because of restrictions contained in the rules governing such services, and we determined that the Private Operational-Fixed Microwave Radio Service was the appropriate service to handle such requirements. Our decision stipulated that we would normally assign only one transmit channel per licensee at each location for omnidirectional operations and only one frequency along each path for directional operations. Additionally, we prohibited the use of private distribution systems for transmitting a licensee's products and services omnidirectionally to apartment house MATV systems and private homes. We determined that this restriction was necessary because we were then studying the possibility of establishing a hybrid classification for omnidirectional transmission of subscription direct-to-home programming services as part of our on-going inquiry into the regulation of direct broadcast satellites, General Docket No. 80-603.

3. The decision to allow Private Operational-Fixed licensees to deliver their products to customers represented a departure from the Commission's traditional regulation of the Private Microwave Service. Previously, OFS systems had been limited essentially to providing point-to-point communications within a single organization for conveying information and instructions related to the main business of the licensee. With adoption of the *First Report and Order*, we expanded the scope of the private service to encompass distribution links for products and services between licensees and their customers.

4. We received petitions to reconsider this decision from the Central Committee on Telecommunications of the American Petroleum Institute (API) and Cablecom Corporation (Cablecom). We also received a Petition

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[2] 47 C.F.R. §94.1 et. seq.

[3] The *First Report and Order* determined that "there appears to be a need for frequencies to distribute program material or other products and services for which no provision has been made under the rules and which should be satisfied by frequencies in the OFS." The Commission concluded that "(t)he bands to be used for this purpose are the three 6 MHz channels in the 2.5 GHz band and the OFS bands above 13 GHz." 86 FCC 2d at 308.

for Clarification of the *First Report and Order* from Microband Corporation of America (Microband).[4]

II. Background

5. In 1972 Columbia Pictures Industries, Inc. (Columbia Pictures) submitted applications to establish and operate five, five-channel private operational-fixed microwave systems.[5] Columbia Pictures sought 125 MHz of contiguous spectrum in the 12.2-12.7 GHz band. It proposed to use the channels primarily for transmitting motion picture films to hotels for viewing by hotel guests. Two channels were to be used for transmitting the picture films to each subscribing hotel. The third channel was to be used to advise hotel guests of the movies which were available for viewing and the starting time of each film. The fourth channel was to be employed for advertisements and to inform guests about attractions and events in the city in which they were staying. The fifth channel was to be used for closed circuit network telecasting of conventions and meetings held at the participating hotels.

6. The Commission determined that Columbia Pictures' applications raised significant questions concerning potential competition with commercial television broadcasting and cable television and the potential siphoning of program material from "free" television. For this reason, the Commission decided to consider the issues raised by the Columbia Pictures' applications as part of a comprehensive inquiry into whether pay cablecasting, subscription TV and other new modes of transmitting program material would affect the public's receipt of motion pictures or other program material over free channels of television broadcasting. The Commission therefore issued a *Notice of Inquiry and Notice of Proposed Rulemaking Memorandum Opinion and Order* in Docket No. 19671.[6] This *Notice* asked for comments on "whether Business microwave frequencies should be used for distribution by the licensee of his product for which a charge is made (such as motion pictures, music, etc.), or his

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[4] API also filed a Request for Stay of our decision. Oppositions to the Request for Stay were filed by Reuters Limited and Cablecom. Cablecom, Reuters, and the Press-Education-Government Foundation filed oppositions to API's Petition for Reconsideration. Cablecom and Reuters filed oppositions to Microband's Petition for Clarification. Reuters also opposed Cablecom's Petition for Reconsideration. Microband filed a Reply to Opposition to its Petition for Clarification, and API filed a Reply to the Opposition to its Petition. On August 14, 1981, the Commission issued a *Memorandum Opinion and Order* (FCC 81-390) denying API's Request for Stay, 87 FCC 2d 768 (1981).

[5] Columbia Pictures applied for OFS systems in Atlanta, GA; Boston, MA; Dallas, TX; Las Vegas, NV, and New Orleans, LA. The Commission subsequently dismissed the application for Atlanta upon request of the applicant.

[6] *Notice of Inquiry and Notice of Proposed Rulemaking Memorandum Opinion and Order* (FCC 73-73), Docket No. 19671, adopted January 17, 1973, 39 FCC 2d 527, 38 Fed. Reg. 2766 (January 30, 1973).

services (such as computer service) to his customers. . . ."[7]

7. At the same time this inquiry regarding use of the Business microwave frequencies was started, the Commission granted Columbia Pictures' applications to the extent of permitting OFS channels to be used for the presentation of feature films and for advising hotel guests of the movies available for viewing and their starting times. The Commission, however, denied authority for the facilities to be used on a for-profit basis for carrying messages concerning attractions and events within a city, and for convention coverage.[8]

8. In denying use of the fourth and fifth channels, the Commission stated that although the services proposed to be offered on these channels might be useful to the public, "they represent a use of private microwave facilities in the Business Radio Service which we think is inconsistent with the purposes for which the Service was established."[9] In 1981 the Commission issued the *First Report and Order* in Docket 19671, which permitted private program distribution services to be offered on the Operational-Fixed Service frequencies. The 2.5 GHz band was designated as available for point-to-multipoint distribution purposes and other OFS bands were designated for fixed point-to-point systems.[10] It is this decision which both API and Cablecom have asked us to reconsider.

III. API's Petition

9. API's Petition for Reconsideration argued that the Commission's decision was deficient because it did not include meaningful consideration of recent developments in telecommunications. Specifically, API noted that the DBS proceeding, which threatened to remove 500 MHz of spectrum from the Private Operational-Fixed Service frequencies, had not

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[7] 39 FCC 2d at 532.

[8] *In Re Proposals by Columbia Pictures Industries, Inc., for Operational Fixed Station Facilities in the Business Radio Service* (FCC 73-71), adopted January 17, 1973, 39 FCC 2d 411, 412. The grant of Columbia Pictures' applications was expressly conditioned on the outcome of Docket No. 19671. According to the Commission's records, Columbia Pictures never constructed any microwave stations pursuant to this authorization and eventually requested that its licenses be terminated without prejudice.

[9] *Id.* The issue of licensing private microwave systems to provide a commercial communications service, however, is the subject of our on-going proceeding in Docket No. 19309 [*Memorandum Opinion and Order, Notice of Inquiry, and Notice of Proposed Rulemaking* (FCC 71-853), adopted August 18, 1971, 31 FCC 2d 766, 36 *Fed. Reg.* 16940 (August 20, 1971)].

[10] The *First Report and Order* also concluded that there was no purpose to be served by imposing "anti-siphoning" program restrictions on private distribution services, since all communications activities should be treated equally insofar as program availability was concerned. *First Report and Order* at paragraph 6, 86 FCC 2d at 303.

been taken into consideration in our *First Report and Order* [11] and that, in view of this potential displacement, the bands under consideration should be employed to accommodate systems which must move from the 12.2-12.7 GHz band. API maintained that eligibility to use these bands should not be expanded to accommodate new types of permissible communications by eligibles who might wish to deliver products or services, and more particularly video entertainment programming, to their customers. API maintained that alternative means of delivering such programming were available and it would impair use of this band by displaced 12.2-12.7 GHz licensees if such new uses were permitted.

10. API also contended that the Commission's decision in the *First Report and Order* appeared to ignore the overall growth which had occurred in conventional private microwave usage between 1973 and 1981. In consideration of this growth and the finite amount of available spectrum, API argued it was inappropriate to adopt rules which expanded eligibility for use of the 2.5 GHz spectrum and which increased the applications to which these frequencies might be put.[12] Moreover, API contended, the conventional usage of private operational-fixed systems for fixed point-to-point transmission of internal licensee business would continue to expand as the cost of common carrier interexchange telecommunication services increased. API was concerned that the recent history of carrier service rate increases would only encourage more segments of the business sector to establish private communication systems for these internal communications purposes and urged the Commission to ensure that sufficient spectrum remained available to accommodate this need, rather than communications of a non-internal business nature.

11. Further, API argued that the OFS spectrum above 13 GHz[13] is not

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[11] Shortly before issuance of the *First Report and Order* in Docket 19671, the Commission adopted a *Notice of Proposed Policy Statement and Rulemaking* in the DBS proceeding, Gen. Docket 80-603 (FCC 81-181), 86 FCC 2d 719, 46 *Fed. Reg.* 30124, adopted April 21, 1981, released June 1, 1981. On July 14, 1982, the Commission issued a *Report and Order* (FCC 82-285), 90 FCC 2d 676, 47 *Fed. Reg.* 31555 (July 21, 1982), which allocated the 12.2-12.7 GHz band for use by the broadcasting-satellite service on a primary basis and provided that after 1988 private operational-fixed stations would be permitted to use 12.2-12.7 GHz frequencies only if they did not cause interference to DBS systems.

[12] As evidence of the growth in conventional OFS usage, API cited the Commission's *Report and Order* in Docket No. 20271, *In the Matter of an Inquiry Relative to Preparation for a General World Administrative Radio Conference of the International Telecommunication Union to consider Revision of the International Radio Regulations* (FCC 78-849), released December 28, 1978, 70 FCC 2d 1193.

[13] The following frequency bands above 13 GHz are available to Private Operational-Fixed licensees: 13.2-13.25 GHz (developmental basis only), 18.36-19.04 GHz, 21.2-23.6 GHz, 31.0-31.2 GHz, and above 38.6 GHz Section 94.61(b) of the Commission's Rules and Regulations, 47 C.F.R. 94.61(b).

satisfactory for the petroleum and natural gas industries. Safety and environmental considerations demand that microwave control systems for petroleum and natural gas pipelines operate with a reliability factor of 99.5%, and the propagation characteristics of the 18 GHz and higher bands preclude this level of reliability, API contended. In API's view, the limited reliability of these higher bands, coupled with the greater equipment costs required for operations at the higher frequencies, makes the OFS bands above 13 GHz an undesirable alternative to the 12.2-12.7 GHz band, at least for the industries noted.

12. API also maintained that a portion of the spectrum in the 2.5 GHz should be used to meet the relatively low density point-to-point requirements of OFS licensees. Re-channelization of the 2.5 GHz spectrum, however, would be necessary to accommodate such usage. Towards this end, API previously had filed comments and reply comments in another proceeding (General Docket No. 80-112) in which the Commission is considering the reallocation of the 2.5-2.69 GHz band.[14] In its pleadings in Docket No. 80-112, API had suggested an alternative to the channeling plan which the Commission proposed. API said that if its approach were adopted the spectrum available in this band would accommodate conventional microwave systems of up to 97 channels. Thus our decision in Docket No. 19671 to permit OFS licensees to distribute video entertainment to customers at 2.5 GHz frustrated to a large extent API's hope that some OFS systems currently operating in the 12.2-12.7 GHz band could be relocated to 2.5 GHz by: (1) expanding the number of eligibles who could have access to the band, (2) refusing to reserve the band for persons displaced at 12.2-12.7 GHz, and (3) making it more difficult subsequently to re-channelize this band in light of the new systems which would be operating there as a result of the decision in Docket No. 19671. In conclusion, API noted that the decision in Docket No. 19671 was based on a record that was eight years old. API maintained that the Commission was not justified in making OFS spectrum available for what it considered to be a redundant video entertainment service. The developments enumerated above which had occurred in the eight years since the docket record was closed, API argued, necessitated reversal of our decision.

IV. Reuters' Response to API

13. In response to the issues raised in API's petition, Reuters argued that the Commission should affirm its earlier decision with respect to

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[14] A *Notice of Inquiry, Proposed Rulemaking and Order*, Gen. Docket No. 80-112 (FCC 80-136), released May 2, 1980, 45 *Fed. Reg.* 29323 (May 2, 1980), proposed to reallocate the 2.5-2.69 GHz band to give the Private Operational-Fixed Service licensees access to 10 channels in the band. The *Notice* proposed that the remaining 2.5-2.69 GHz channels be split among the Instructional Television Fixed Service (11 channels) and the Multipoint Distribution Service (10 channels).

point-to-multipoint systems which might wish to operate in the 2.5 GHz band. Reuters supported the Commission's decision to expand the scope of the private services to include the delivery of services to licensees' customers. Reuters also noted that it proposed to provide an information distribution service which is different from the video entertainment services to which API seemed primarily to be objecting, but which would be affected equally adversely if we granted API's request. Reuters stated that API's contention regarding the need to reserve this spectrum for traditional private service uses is less than compelling in light of the lack of interest shown by conventional users in utilizing the three 6 MHz channels in the 2.5 GHz band during the eight years in which Docket No. 19671 was pending.

V. Cablecom's Response to API

14. In its opposition to API's petition, Cablecom stated that the Commission's decision to expand the scope of permissible operation in the private microwave service was desirable and served the public interest. Cablecom also noted that the Commission did not take any previously allocated spectrum away from OFS users, but merely removed some restrictions which had previously been applied to OFS licensees. Cablecom argued that the channels in the 2.5 GHz band had gone virtually unused for a decade while needed communication paths for the distribution of products and services were not provided. It argued that the public interest was not served by continuing to deny access to this spectrum for distribution purposes, especially in light of the history of more traditional private service users not seeking to employ the 2.5 GHz band.

15. Both Cablecom and Reuters pointed out that the use of the 2.5 GHz channels in the manner urged by API would require a basic modification of the present allocation structure for these channels. In the absence of such a modification, they maintained, API's position would not be improved, even if it were to prevail on reconsideration. They argued that the issue of channelization of this band is beyond the scope of this proceeding and should be addressed instead in Docket 80-112.

VI. Other Comments

16. Both Cablecom and the Press-Education-Government-Foundation also questioned whether the public interest would be served by preserving the 2.5 GHz band for some potential future use which may or may not develop rather than using the frequencies immediately for a service having an existing, well-established demand. Both parties contended that by providing additional channels of communication, the Commission is helping to create diversity in the means of disseminating programming and also is providing relief to program originators. Finally, Cablecom maintained that any belief about an increase in private systems usage

because of possible increases in inter-exchange and intra-exchange telephone service charges is pure speculation and that the *First Report and Order* did consider those events which occurred since the initiation of this rulemaking and which are of significance to the substantive content of the Order.

VII. Cablecom's Petition

17. As already pointed out, Cablecom generally supported our *First Report and Order*. It requested, however, that we reconsider three aspects of it. First, Cablecom requested that we not restrict licensees to one 6 MHz channel in the 2.5 GHz band but permit them to have two or more channels. Cablecom contended, among other things, that this restriction makes it impossible for a licensee to remain economically viable when distributing video programming and makes no sense in smaller communities. Cablecom stated that the Satellite Television Corporation's proposal for three direct broadcast satellite channels provides ample evidence that multiple channels of service are necessary for economic viability. Cablecom maintained that it is impossible to develop a system of competitive video distribution unless the operator can, in fact, equally compete, and the Commission's rules placed OFS licensees at a competitive disadvantage with respect to MDS operators. This is so, Cablecom said, because the user of an MDS channel could apply for one OFS channel in a market, thereby being able to offer two channels in the same market. The OFS licensee, by contrast, could only offer one channel.

18. Second, Cablecom requested that we lift the prohibition against directly transmitting video programming to apartment house MATV systems or private homes using the three 6 MHz channels in the 2.5 GHz band. Cablecom contended that it is inequitable to impose this restriction on licensees in the OFS and not on MDS, cable or subscription TV systems. It maintained that transmissions utilizing OFS are not analogous to broadcasting and to regard them in such a manner is without legal foundation. Cablecom stated that by waiting to resolve this issue in General Docket No. 80-603, which is concerned primarily with the Direct Broadcast Satellite Service, we would significantly delay disposition of the matter.[15]

19. Third, Cablecom requested that we adopt revised engineering criteria which would more accurately reflect the present state of

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[15] It should be noted that in the DBS *Report and Order* adopted June 23, 1982, we declined to require DBS systems to operate under a particular service classification during the developmental and experimental period of the DBS Service. We stated that, based on the experience gained during the experimental period, we could later establish DBS as a permanent service according to traditional classifications, create a new classification as dictated by public interest mandates, or retain the existing open entry policy. 90 FCC 2d at 708, 47 *Fed. Reg.* at 32568.

technology for the 2.5 GHz band. It noted that the quality of both transmitting and receiving equipment for this band has improved since the beginning of this proceeding, and that good engineering standards should be established to protect licensees.

VIII. Reuters' Response to Cablecom

20. In response to the matters raised in Cablecom's petition, Reuters expressed opposition to Cablecom's first and third requests. Reuters was of the opinion that the limits imposed on channel assignments to individual licensees was entirely consistent with, and required by, the statutory obligation to provide a fair, efficient, and equitable distribution of radio service enunciated in Section 307(b) of the Communications Act of 1934, as amended. Reuters stated that it is entirely appropriate for the Commission to distribute the frequencies equitably among qualified applicants, rather than to turn the entire band over to a single licensee in a particular market. Further, citing Home Box Office as an example, Reuters pointed out that single channel video services have proven to be quite profitable. Regarding Cablecom's third request, Reuters stated that the question of the development of a different set of technical standards for the 2.5 GHz band was not an issue in Docket No. 19671.[16] Reuters concluded that the adoption of entirely new technical standards would not be appropriate in this proceeding. Finally, Reuters noted that the issue of different technical standards for the 2.5 GHz band is under consideration in General Docket No. 80-113.[17]

IX. Discussion and Decision

21. The petitions for reconsideration urge us to select between diametrically opposed regulatory policies for the private services. While most of the discussion addressed the future of the 2.5 GHz band, the entire future scheme of regulation for the Private Operational-Fixed Microwave Service is at issue. API would have us restrict permissible communications to traditional uses involving purely internal communications requirements. Reuters, Cablecom, and others seek to have us reaffirm our decision to expand the scheme of regulation for this service to encompass existing and recognized communications needs which are not now being met.

22. In reaching our decision in the *First Report and Order*, we noted that the Commission has a statutory obligation to "encourage the larger and more effective use of radio in the public interest."[18] "Consequently," we said, "the Commission believes that it is in the public interest to allow

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[16] Neither Reuters nor any other party addressed Cablecom's second point.

[17] A *Notice of Inquiry and Proposed Rulemaking* was adopted in Gen. Docket No. 80-113 on March 19, 1980 (FCC 80-137), 45 *Fed. Reg.* 29350 (May 2, 1980).

[18] 47 U.S.C. Section 303(g).

the use of the OFS frequencies for distribution purposes and, more generally, to restrict as little as possible alternative uses of spectrum."[19]

23. It has become obvious that a private program distribution service is needed if existing communications needs are to be met in a timely fashion. We base this conclusion on the enthusiastic response of applicants to our *First Report and Order*. We have received approximately 1,400 applications from about sixty different entities seeking to provide video entertainment services to hotels and other locations on the three 2.5 GHz OFS channels.

24. To date, none of the 1,400 applications have been processed, however. We have delayed processing for two main reasons. First, many of the applications are mutually exclusive with one another and until the regulatory scheme we were adopting was clarified on reconsideration, it did not seem prudent to embark on administrative hearings to resolve the problem of the competing applications. Second, since the 2.5 GHz channels allocated to the Operational-Fixed Service are in a band allocated predominantly for the Instructional Television Fixed Service, any OFS stations authorized in the band should not conflict with the technical standards established for ITFS (Part 74 of the Commission's Rules).[20] However, as we have already pointed out, the question of technical standards posed special concerns because the standards themselves currently are undergoing review in another ongoing docket proceeding, Gen. Docket No. 80-113. There, in a *Notice of Inquiry and Proposed Rulemaking* issued in March 1980 the Commission suggested the possibility of adopting more stringent technical standards to control spurious co-channel interference in the 2.5 GHz band. That *Notice* also suggested that improved discrimination performance standards for receivers, limitations on maximum effective radiated power, and tighter frequency tolerance might be necessary.[21] For these reasons, therefore, applications were not processed pending some resolution of the issues on reconsideration.

25. Additionally, at the time of our *First Report and Order* in Docket 19671, the character and scope of the Direct Broadcast Satellite Service was undefined. As we have stated, the Commission had adopted a *Notice of Proposed Policy Statement and Rulemaking* in Gen. Docket 80-603 less than a month before adopting the *First Report and Order* in Docket 19671.[22] Thus, while we had identified the 12.2-12.7 GHz band as the

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[19] *First Report and Order*, Docket No. 19671, at paragraph 12, 86 FCC 2d at 306.

[20] Section 94.65(f) of the Commission's Rules and Regulations.

[21] *Notice of Inquiry and Proposed Rulemaking*, Gen. Docket No. 80-113, paragraphs 44-54, 45 Fed. Reg. 29350 (May 2, 1980).

[22] See footnote 11.

spectrum likely to be used for DBS,[23] we had not determined how much of the spectrum would be devoted to the new service and, hence, the extent of the impact on OFS licensees in the 12.2-12.7 GHz band was unknown. The Direct Broadcast Satellite Service *Notice of Proposed Policy Statement and Rulemaking* stated "because we do not yet know the demand for DBS or its ultimate spectrum needs, we will attempt to accommodate interim DBS systems with as little disruption as possible to the terrestrial users now in the 12 GHz band."[24]

26. It now appears that the Direct Broadcast Satellite Service will require the full 500 MHz of spectrum in the 12.2-12.7 GHz band. We have determined, therefore, that the DBS service should have sole primary status in the 12 GHz band after 1988.[25] As a result, most OFS licensees now using the 12.2-12.7 GHz band will have to move to other frequencies within the next five years. The accommodation of these users, therefore, is of serious concern to us.[26]

27. We think there is some merit to Cablecom's arguments that licensees should not necessarily be confined to a single channel if their need is greater. However, we also agree with Reuters that the number of channels available at 2.5 GHz is so small as to require some equitable distribution of frequencies among applicants. In light of all these considerations, we have reviewed carefully the petitions and comments before us. On reconsideration we affirm our earlier decision to amend the Private Operational-Fixed Microwave rules to permit the delivery of products and services between licensees and their customers. We feel that our mandate to study and accommodate the larger and more effective use of radio in the public interest is clear, and to the extent that our decision allows presently unmet communications requirements to be satisfied we affirm its correctness. However, we also conclude that some modification of our earlier *Report and Order* is appropriate.

28. When adopting the *First Report and Order* in this proceeding, the Commission concluded that video entertainment distribution on an omnidirectional basis should be limited to the three OFS channels at 2.5 GHz. This decision was based on our determination that video entertainment distribution would not be feasible in most of the other OFS bands due to

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[23] *Notice of Proposed Policy Statement and Rulemaking,* Gen. Docket 80-603, at paragraph 2, 86 FCC 2d at 720.

[24] *Id.* at paragraph 4.

[25] *Report and Order*, Gen. Docket 80-603, at paragraph 67, 90 FCC 2d at 702, 47 Fed. Reg. at 31566.

[26] A *Notice of Proposed Rulemaking* which considered the issue of how to accommodate displaced 12 GHz users was adopted in Gen. Docket 82-334 on January 13, 1983 (FCC 83-2), 48 *Fed. Reg.* 6730. This *Notice* proposed to make spectrum available at 2 GHz, 6 GHz, 13 GHz, and 18 GHz by increasing the sharing among private radio, common carrier, broadcast, and cable TV services and by adjusting certain technical parameters.

the heavy occupancy of those bands by existing point-to-point systems. Indeed, the high concentration of point-to-point microwave links for industrial, public safety, business and educational purposes in the bands 1.85-1.99 GHz, 2.13-2.15 GHz, 2.18-2.2 GHz, 2.45-2.5 GHz, and 6.525-6.875 GHz continues to make these bands unattractive for purposes of distributing video entertainment programming. We also do not think the bands at 13.2-13.25 GHz and 18.36-19.04 GHz should be made available at this time for video entertainment distribution services since this spectrum is already under consideration as likely alternatives for accommodating the OFS licensees who will be displaced from 12.2-12.7 GHz by the Direct Broadcast Satellite Service.[27] However, congestion is not a problem in the 21.2-23.6 GHz band. There we could accommodate many more entertainment systems than is possible at 2.5 GHz. We could also allow multiple channels per applicant in the event that a requirement for more than one channel could be shown. After considering this matter, therefore, we feel there is merit to modifying our earlier decision by designating the 21.2-23.6 GHz band and higher OFS bands as the appropriate locus for the operation of these private service systems which would deliver video entertainment products to their customers. Moreover, since there is little existing use of this band, neither point-to-point nor point-to-multipoint operational methods should adversely affect existing systems in this band. This decision also has the further benefit of maintaining the availability of the lower bands for displaced 12.2-12.7 GHz licensees, while at the same time expanding the availability of the 2.5 GHz band to such new uses as data delivery systems. In a separate action taken today in Gen. Docket 80-112, we are allocating an additional eight channels in most cities for the Multipoint Distribution Service.[28] We feel that the increased number of channels for the MDS service, coupled with the licensing of private video entertainment services in the OFS bands above 21.2 GHz, should be adequate to accommodate the existing demand for commercial distribution of video entertainment material.

29. We recognize, however, that the OFS systems which will be established to distribute products and services other than video entertainment may not completely use the three 2.5 GHz channels in every market. While we seek to create an environment in which applicants who propose to distribute products and services other than video entertainment will have an adequate opportunity to establish distribution systems at 2.5 GHz, we also want to ensure that the potential of the 2.5 GHz channels is

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[27] Video entertainment in the only other private operational-fixed microwave spectrum below 21.2 GHz, the 928-929 and 952-960 MHz bands, is not feasible because the bandwidths available cannot accommodate video transmissions.

[28] *Report and Order and Further Notice of Proposed Rulemaking* in General Docket 80-112 (FCC 83-243), 94 FCC 2d 1203 (1983).

fully exploited. If subsequent developments show that the demand for data and other information distribution systems in some areas can be satisfied with less than three channels, we feel it is in the public interest to make the frequencies available for video entertainment purposes as well. We think this dual goal of encouraging the growth of information distribution systems and promoting the full utilization of the spectrum can be achieved best by adopting rules which, first, designate a reasonable time period in which we will issue licenses only for applicants proposing to distribute material other than video entertainment and, second, upon expiration of the time period established, open up the frequencies for distribution of video entertainment material. We think that two years is a reasonable period of time to set aside for this purpose. Accordingly, for a two-year period commencing August 1, 1983, we will not authorize any private video entertainment distribution systems at 2.5 GHz. After this two-year period has elapsed, we will authorize the operation of video entertainment distribution systems.[29]

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[29] The *First Report and Order* in Docket No. 19671 noted that the Commission had initiated an inquiry into the desirability of establishing a "hybrid" classification for multipoint transmission of subscription direct-to-home programming services as part of the direct broadcast satellite proceeding (Gen. Docket No. 80-603). Further, the *First Report and Order* announced that the Commission would not license point-to-multipoint OFS microwave facilities to transmit programming directly to apartment house MATV systems or private homes, pending resolution of the direct-to-home programming issue. 86 FCC 2d 311. In the *Report and Order* adopted June 23, 1982 in Docket 80-603, the Commission declined to adopt a permanent service classification to govern direct broadcast satellite systems during the developmental stage of the service. 90 FCC 2d 708-09.

While we have deferred making any decision regarding the possible need for a hybrid classification for experimental direct-to-home DBS programming, we see no similar need to defer a decision with respect to the classification of entertainment programming transmitted by OFS licensees. Due to the more limited, point-to-multipoint nature of the signals which will be transmitted, the licensing of program distributors in the OFS does not prompt the same regulatory concerns as with the nationwide DBS Service. Therefore, we see no further need to await a decision which later might be made in Docket 80-603 regarding the appropriate regulatory classification for experimental DBS systems.

There is clear precedent for determining that the OFS entertainment services are not "broadcasting." We recognize that the programming content of OFS entertainment service offerings may be very similar to the content of conventional "free" broadcast services. Unlike conventional broadcasting services, however, the OFS services are "addressed" communications intended for, and directed to, specific points of reception — the licensee's paying customers, in a manner similar to subscription FM radio services. Thus, OFS entertainment transmissions would fall within the category of "hybrid" communications, i.e., exhibiting characteristics of both broadcasting and point-to-point services. See *WFTL Broadcasting Company*, 45 FCC 2d 1152, 1153-54 (1974); see also *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 465 (1980). As such, the services are not required to comply with the statutory provisions applicable to traditional

30. We will, consistent with the rules adopted here, act on applications in the Private Microwave Service which request the use of frequencies below 21.2 GHz and do not involve the delivery of video entertainment directly to customers or to the ultimate customer delivery system. This means that, during the interim two-year period discussed above, the operators of private distribution systems in the OFS band below 21.2 GHz will only be permitted to distribute to their customers material which is not video entertainment. This, we feel, is consistent with our objective of accommodating existing unmet communications needs while at the same time assuring that the existing and projected uses of frequencies in the lower OFS bands are satisfied. In the OFS frequencies above 21.2 GHz, we will allow licensees to deliver any of their own products or services to any receiving location, including hotels, apartment house MATV systems, and private residences.

31. Both the growth of the more traditional microwave uses and the displacement of systems at 12.2-12.7 GHz are of great concern to us. However, we do not view either of these as reasons not to accommodate expanding communications needs. We have indicated our intention to explore the matter of the efficient and effective use of certain of the bands above 1 GHz and the staff is, in fact, now doing so.[30] We expect to consider, in the near future, the general question of the growth in the use of microwave and how it may be satisfied as well as the more specific question of the accommodation of systems displaced from the 12.2-12.7 GHz band. Part and parcel of this is the appropriateness of particular bands for particular types of needs. We affirm, however, that those matters do not constitute an impediment to the accommodation of existing, unmet communications needs as identified and resolved herein.[31]

32. Our decision today affirms our determination that it is in the public interest to permit licensees in the Private Operational-Fixed Microwave Service to distribute their own products and services to their customers, and we will allow this in all bands allocated for OFS use. However, we are modifying our earlier decision by designating a two-year period during which licensees in the Private Operational-Fixed Microwave Service will be precluded from using their facilities to deliver video entertainment material in bands other than those above 21.2 GHz. This,

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broadcasting services. In reaching this determination, we rely on our established administrative discretion to exempt hybrid services from those statutory provisions. *See Greater Washington Educational Telecommunications Association, Inc.*, 49 FCC 2d 948 (1974).

[30] *Notice of Proposed Rulemaking* in Gen. Docket 82-334.

[31] With regard to the question of the possible re-channelization of the 2.5 GHz band, this is the subject of a separate proceeding (Gen. Docket 80-112) and will not be addressed further here.

combined with the Commission's decision in Docket No. 81-794 authorizing licensees of Auxiliary Broadcast facilities to sell their excess capacity on a private carrier basis and our decision in General Docket 80-112 to allocate additional channels for MDS should assure that adequate spectrum is available for video distribution services, while at the same time accommodating present and future requirements for other types of private microwave systems.

33. Implementation of this decision requires that we develop a coherent and manageable approach to the approximately 1,400 applications now on file for the 2.5 GHz band. The innumerable variations among these applications greatly increases the complexity of the task before us. There are pending applications for entertainment distribution systems which were filed long before the Commission's 1981 decision permitting OFS frequencies to be used for such purposes. Some of these applications date back to 1975. There are applications filed after the 1981 *First Report and Order* which seek to use the same frequencies as those applied for by other applicants during the period 1975-1980. Some pending applications propose to distribute video entertainment material directly to homes and apartment houses, even though this was expressly prohibited in the *First Report and Order*. Other applications propose to use two and sometimes three of the 2.5 GHz OFS channels, despite the fact that the *First Report and Order* specifically limited licensees to one transmit channel at each location. Of those remaining applications which appear to comply with the rules adopted in 1981, most do not detail the specific type of product or program material to be transmitted to their customers. In this environment, it would be impossible to resolve equitably the problems posed by the numerous competing applications. If we strictly apply the cutoff procedures detailed in Section 1.227(b)(4) of the Commission's Rules, applicants who filed after the May 1981 *First Report and Order* would have little chance of being licensed for the 2.5 GHz channels in the areas sought by applicants who filed before the 1981 decision. However, this approach would unfairly reward those who submitted applications to distribute data and program material to their customers even before the Commission determined that such uses of the OFS frequencies should be sanctioned.

34. Moreover, though the failure of applicants to describe specifically the type of program material to be carried on their proposed systems was not a problem under the terms of the 1981 decision, it is now essential, in order for us to implement the decisions we are here reaching, to know what type of material licensees intend to distribute to their customers. Thus, with our decision to preclude the distribution of video entertainment material for a two-year period, the nature of the information we need from applicants changes significantly. Furthermore, whereas our 1981

decision left intact the rules governing emission standards for the 2.5 GHz OFS channels, we are now changing the rules to permit licensees to use emission types which are more compatible with the transmission of data. Previously, OFS licensees at 2.5 GHz were restricted to the use of A5 and F3 classes of emission. In this decision, however, we remove these restrictions and permit licensees to use other types of emissions, consistent with efficient use of the spectrum and good engineering practices. This change, therefore, also alters the nature of the information which we will require from licensees.

35. Our preliminary analyses show that virtually all of the 1,400 pending applications would have to be revised in one way or another to be acceptable under the rules we are now adopting. The process of scrutinizing each individual application now on file for defects, notifying each applicant of the defects, and receiving, logging, and filing the amendments submitted for each of the 1,400 applications would severely tax the capabilities of the application processing staff. Therefore, recognizing that our decision significantly changes the operating rules for private OFS distribution systems at 2.5 GHz and in light of the overwhelming burden which would be placed on our staff resources by processing amendments to the existing applications, we have determined that it is necessary to dismiss all of the pending applications for 2.5 GHz distribution systems. We will open a new filing period for applicants who seek to use the 2.5 GHz OFS channels for the distribution of products and services other than video entertainment material. This filing period will begin on August 1, 1983. Beginning on that date, we will accept for filing all applications for 2.5 GHz distribution systems which are consistent with the terms of this decision. We will strictly apply the cutoff procedures detailed in Section 1.227(b)(4) of the Commission's Rules to all 2.5 GHz applications which are filed in response to this decision. This means that there will be a new 60-day filing period opened up for competing applications for each of the three 2.5 GHz channels in each locale, commencing with the first such application which we accept for filing in each area. We will select among mutually exclusive applications through use of a lottery as provided for in the *Second Report and Order* in General Docket No. 81-768.[32] We will normally assign only one point-to-multipoint transmit channel per licensee at each location.

36. We will begin processing immediately applications for private distribution services in the 21.2-23.6 GHz band which are consistent with the rules we are now adopting for that band. As announced in the *First Report and Order*, we will normally assign only one transmit channel or

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[32] See new rule Section 1.972, adopted March 31, 1983 in the *Second Report and Order* in Docket No. 81-768 (FCC 83-114), 93 FCC 2d 952 (1983).

frequency along each path for directional operations, absent a showing justifying a greater spectrum requirement.

37. We will begin accepting applications for video entertainment distribution systems at 2.5 GHz on August 1, 1984. Any such applications filed on or after August 1, 1984 will compete on an equal basis for unassigned 2.5 GHz channels with all timely applications for data and information distribution systems which may be filed on or after August 1, 1984. Beginning with the applications filed on August 1, 1984, then, we will assign 2.5 GHz channels in accordance with the procedures set out in Sections 1.227 and 1.972 of the Rules, irrespective of the type of material which applicants propose to distribute. However, applicants filing for 2.5 GHz channels on or after August 1, 1984 will still be subject to the two-year prohibition on video entertainment distribution and therefore may not commence operation of a video entertainment distribution system at 2.5 GHz until August 1, 1985.

X. Other Matters

A. Petition for Clarification of Processing Procedures

38. After the adoption of our *First Report and Order,* Microband Corporation filed a Petition for Clarification in which it sought to ascertain how we would treat applications for private distribution services which had been filed before we adopted the *First Report and Order.* Several of the applications for program distribution services now on file were submitted long before we amended Part 94 to permit licensees to distribute products and programs. Microband was concerned that the cut-off procedures which govern applications in the Operational-Fixed Service[33] would be applied in such a way as to foreclose applicants who filed after the *First Report and Order* from being considered for the same frequencies requested by the early applicants. Having determined that it is necessary to return all the applications previously submitted for the 2.5 GHz band, we find that the issues raised by Microband are moot and need not be given further consideration.

B. Regulatory Flexibility Act

39. The Regulatory Flexibility Act of 1980 does not apply to rules adopted after January 1, 1981 when the underlying notice of proposed rulemaking was adopted before that date. The underlying *Notice of Proposed Rulemaking* for this proceeding was adopted January 17, 1973. Accordingly, there is no need for certification under the Regulatory Flexibility Act. See 5 U.S.C. §601.

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[33] Section 1.227(b)(4) of the Commission's Rules and Regulations, 47 C.F.R. 1.227(b)(4).

XI. Ordering Clauses

40. In view of the foregoing, IT IS ORDERED that Part 94, 47 C.F.R. Part 94, IS AMENDED as shown in the attached Appendix, effective August 1, 1983. The authority for this action is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 303.

41. IT IS FURTHER ORDERED, That the Petitions for Reconsideration filed by Cablecom Corporation on June 15, 1981 and by the Central Committee on Telecommunications of the American Petroleum Institute on June 22, 1981 are denied, and the Petition for Clarification filed by Microband Corporation of America is dismissed as moot.

42. IT IS FURTHER ORDERED, That this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Chapter I, Part 94 of Title 47 of the Code of Federal Regulations is hereby amended as follows:

1. Section 94.3 is amended by adding the definition for "Video Entertainment Material" to read as follows:

§94.3 Definitions.

* * * * *

Short Haul System. * * *

Video Entertainment Material. The transmission of a video signal (e.g. United States Standard Monochrome or National Television System Committee 525-line television) and an associated audio signal which is designed primarily to amuse or entertain, such as movies and games.

2. Section 94.9 is amended by revising subparagraphs (a)(1), (b)(2) and (b)(3) to read as follows:

§94.9 Permissibility of communications.

(a) ***

(1) The licensee's own communications, including the transmission of the licensee's products and information services to the licensee's customers, except that the distribution of video entertainment material to customers on the frequencies below 21,200 MHz shall be permitted only as indicated in §94.61(b).

* * * * *

(b) ***

(2) Transmission of program material for use in connection with broadcasting, except that:

(i) the facilities may be used to transmit program material from one location to another, provided that the operational-fixed frequencies do not serve as the final link in the chain of distribution of the program material to broadcast stations.

(ii) the facilities of closed circuit educational television systems that have been licensed to educational institutions may be utilized for the transmission of program material to noncommercial educational broadcast stations, provided that the use of the facilities exclusively for carrying such program material shall be less than 50 percent of their total use during any one of the license period, no charge either direct or indirect shall be made for such use, and licensees shall submit reports with their applications for renewals showing the breakdown of usage in terms of primary and alternate uses during each year of the license term.

(iii) in the frequency bands above 21,200 MHz, OFS licensees may deliver any of their own products or services to any receiving location.

(3) To provide the final link in the chain of transmission of program material to cable television systems, multipoint distribution systems, or master antenna TV systems, except in the frequency bands above 21,200 MHz.

3. Section 94.25 is amended by adding a new paragraph (k) to read as follows:

§94.25 Filing of applications.

* * * * *

(k) During the period August 1, 1983 - July 31, 1984, no applications proposing to establish private video entertainment distribution systems in the 2.5-2.69 GHz band will be accepted for filing.

4. Section 94.31 is amended by adding a new paragraph (j) to read as follows:

§94.31 Supplemental information to be submitted with application.

* * * * *

(j) When an applicant proposes to distribute its own products or services to customers using operational-fixed frequencies in the bands below 21,200 MHz, a statement which specifically describes the nature of the products or services to be distributed.

5. Subsection 94.61(b) is amended by revising existing footnotes 3 and 15, deleting existing footnotes 20 and 21, adding new footnotes 20, 21, 22, and 23, and amending the Frequency Band table to read as follows:

§94.61 Applicability

* * * * *

(b) Frequencies in the following bands are available for assignment to stations in the Private Operational-Fixed Microwave Service:

FREQUENCY BAND (MHz)	
928-929	(19), (20)
952 to 960	(1), (20)
1850 to 1990	(2), (15)
2130 to 2150	(2), (21)
2150 to 2160	(3)
2180 to 2200	(2), (21)
2450 to 2500	(4), (21)
2500 to 2690	(5), (22)
6525 to 6575	(15)
6575 to 6625	(2), (15)
6625 to 6875	(2), (8), (15)
12,200 to 12,500	(2), (21)
12,500 to 12,700	(2), (6), (21)
13,200 to 13,250	(9), (14), (16), (21)
18,360 to 19,040	(8), (10), (17), (21)
21,200 to 22,000	(10), (11), (12), (13), (23)
22,000 to 23,600	(10), (12), (13), (23)
31,000 to 31,200	(9), (23)
38,600 to 40,000	(9), (18), (23)
Bands above 40,000	(16), (23)

* * * * *

3 Frequencies in this band are shared with stations in the Multipoint Distribution Service (Part 21). These frequencies may be used for the transmission of the licensee's products and information services, excluding video entertainment material, to the licensee's customers.

* * * * *

15 This band is not available to persons and entities whose sole basis for eligibility in the Private Operational-Fixed Microwave is established under §90.75(a)(1) relating to the Business Radio Service (Part 90). Persons and entities eligible for this band may use these frequencies for the point-to-point transmission of their products and information services, excluding video entertainment material, to their customers.

* * * * *

20 The frequencies in this band which are allocated for Part 94 multiple address systems are available for point-to-multipoint transmission of the licensee's products and information services, excluding video entertainment material, to the licensee's customers. Other frequencies in this band are available for the point-to-point transmission of the licensee's products and information services, excluding video entertainment material, to the licensee's customers.

21 This band is available for radio systems to be used for the point-to-point transmission of the licensee's products and information services, excluding video entertainment material, to the licensee's customers.

22 This band is available for radio systems to be used for the point-to-multipoint transmission of the licensee's products and information services to the licensee's customers. However, this band may not be used for the distribution of video entertainment material prior to August 1, 1985.

23 This band is available for radio systems to be used for the point-to-point transmission of the licensee's program material services to the licensee's customers.

6. Section 94.65 is amended by revising paragraph (a)(1) to read as follows:

§94.65 Frequencies.

* * * * *

(a) ***

(1) ***

PAIRED FREQUENCIES (MHz)

Remote Transmit	*Master Transmit*
928.0125	952.0125[2, 6]
928.0375	952.0375[2, 6]
928.0625	952.0625[2, 6]
928.0875	952.0875[2, 6]
928.1125	952.1125[2, 6]
928.1375	952.1375[2, 6]
928.1625	952.1625[2, 6]
928.1875	952.1875[2, 6]
928.2125	952.2125[2, 6]
928.2375	952.2375[2, 6]
928.2625	952.2625[2, 6]
928.2875	952.2875[2, 6]
928.3125	952.3125[2, 6]
928.3375	952.3375[2, 6]
928.3625	952.3625[3, 6]
928.3875	952.3875[3, 6]
928.4125	952.4125[3, 6]
928.4375	952.4375[3, 6]
928.4625	952.4625[3, 6]
928.4875	952.4875[3, 6]
928.5125	952.5125[3, 6]
928.5375	952.5375[3, 6]
928.5625	952.5625[3, 6]
928.5875	952.5875[3, 6]
928.6125	952.6125[3, 6]
928.6375	952.6375[3, 6]
928.6625	952.6625[3, 6]
928.6875	952.6875[3, 6]
928.7125	952.7125[3, 6]
928.7375	952.7375[3, 6]
928.7625	952.7625[3, 6]
928.7875	952.7875[3, 6]
928.8125	952.8125[3, 6]
928.8375	952.8375[3, 6]

UNPAIRED FREQUENCIES (MHz)

928.8625[4]
928.8875[4]
928.9125[4]
928.9375[4]
928.9625[4]
928.9875[4]

956.2625[2,5,6]
956.2875[2,5,6]
956.3125[2,5,6]
956.3375[2,5,6]
956.3625[2,5,6]
956.3875[2,5,6]
956.4125[2,5,6]
956.4375[2,5,6]

959.8625[4]
959.8875[4]
959.9125[4]
959.9375[4]
959.9625[4]
959.9875[4]

* * * * *

[6] Available for radio systems to be used for the point-to-multipoint transmission of the licensee's products or services, excluding video entertainment material, to the licensee's customers.

7. Section 94.69 is revised to read a follows:

§94.69 Types of emission.

Stations in this service will be authorized any type of emission, method of modulation, and transmission characteristic, consistent with efficient use of the spectrum and good engineering practice, except that type B, damped-wave emission will not be authorized.

8. Section 94.71 is amended by deleting paragraph (f) and by revising paragraph (b) to read as follows:

§94.71 Emission and bandwidth limitations.

* * * * *

(b) The maximum bandwidth which will be authorized per frequency assigned is set out in the table as follows. (Regardless of the maximum authorized bandwidth specified for each frequency band, the Commission reserves the right to issue a license for less than the maximum bandwidth if it appears that a lesser bandwidth would be sufficient to support an applicant's intended communications.)

Frequency band MHz	Maximum authorized bandwidth
928-929 MHz	25 kHz 1, 7

* * * * *

Antenna
Domestic Fixed Satellites
Rules, Modification of
Satellite Earth Station Facilities

Reconsideration of *Licensing of Space Stations in the Domestic Fixed Satellite Service and Related Revisions of Part 25 of the Rules and Regulations* including revisions of space station standards and of Part 25 rules relating to antenna performance standards granted to an extent and denied in all other respects.
—*Reduced Orbital Spacing*
CC Docket No. 81-704

FCC 84-487

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Licensing of Space Stations in the Domestic Fixed-Satellite Service and Related Revisions of Part 25 of the Rules and Regulations	CC Docket No. 81-704

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 1984; Released: January 9, 1985

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

I. Introduction

1. In *Reduced Orbital Spacing,*[1] we adopted a reduction in orbital spacing to 2° in both the 4/6 GHz and 12/14 GHz frequency bands for the domestic fixed-satellite service,[2] and a consequent tightening of antenna performance standards set out at 47 C.F.R. §25.209 of the Commission rules. As a result of these decisions, we were able to grant authorizations for construction and/or launch of 19 new satellites and to assign orbit

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[1] *Licensing of Space Stations in the Domestic Fixed-Satellite Service,* (hereinafter *Reduced Orbital Spacing),* 54 Rad. Reg. 2d 577 (1983).

[2] Orbital spacings of 2° between domestic satellites are to be implemented immediately in the 12/14 GHz band. In the 4/6 GHz band, the transition will be more gradual due to the nature of the operation of existing earth station and satellite facilities in service there. A combination of 3°, 2.5° and 2° spacings in that band have been assigned in the interim.

locations to 38 space stations in the domestic fixed-satellite service. In addition, we specified processing procedures governing the next group of satellite applications.

2. Petitions requesting partial reconsideration of *Reduced Orbital Spacing*[3] were filed by Alascom, Inc. (Alascom), American Satellite Company (American Satellite), Communications Satellite Corporation (Comsat), Equatorial Communication Services (Equatorial), Group W Cable, Inc. (Group W), Satellite Syndicated Systems, Inc. (SSS), Society for Private and Commercial Earth Stations (SPACE) and Vitalink Communications Corporation (Vitalink). In general, these petitions focussed on the difficulties of immediate implementation of reduced spacing and conformance to more stringent technical standards.[4] For the reasons set forth below, we find that some minor changes to these standards are warranted.

II. Orbital Spacing

3. Several parties seeking reconsideration have restated their concern that technology is not sufficiently developed to provide equipment which would be effective with reduced satellite spacing at 4/6 GHz.[5] In particular, Group W urged the Commission to delay implementation of reduced spacing in this band until improved small antennas are available to serve the cable television industry both efficiently and economically in a 2° spacing environment. Group W argues that only larger and more expensive antennas are currently available for such use, and that the Commission has not adequately considered certain technical factors that would adversely affect current small antennas if orbital spacings were reduced. In the same vein, SPACE urges us to require strict and mandatory polarization standards between satellites actually spaced 2° apart at 4/6 GHz to combat the increased interference caused by reduced

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[3] Other parties filing oppositions and/or reply comments include Associated Press, Ford Aerospace Satellite Services Corporation, M/A-Com, Inc., Public Broadcasting Service, SatCom Technologies, Inc., and Satellite Business Systems.

[4] The petition for reconsideration of *Reduced Orbital Spacing* filed by Western Union Telegraph Company and related pleadings regarding authorization actions will be addressed when we act on Western Union's petition for reconsideration of *Western Union Telegraph Company*, 94 FCC 2d 467 (1983). Reconsideration of specific orbital assignments have already been addressed in *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, FCC 84-32, released February 2, 1984, and FCC 84-181, released May 15, 1984.

[5] We have also noted and considered the late comments filed by Entertainment and Sports Programming Network Inc. on July 27, 1984 which reiterate issues raised by other commenting parties and ask that our move to 2° spacing be made slowly and with due regard for increased expenses and decreased signal quality. It proposes a time-phased approach an implementing 2° spacing.

spacing.[6]

4. Notwithstanding these concerns, the parties support our objectives in reducing satellite spacing to 2° to assure future domestic satellite development and to create opportunities for expansion of existing services. They emphasize the difficulties acknowledged in *Reduced Orbital Spacing* related to high costs and disruption that would be caused by an immediate move to 2° spacing at 4/6 GHz.[7] We recognized these problems when we ordered a gradual transition to reduced spacing. This accommodation provided for an average 2.5° separation with spacings as high as 3° and as low as 2° for a transitional period. The parties are apparently not satisfied with this result, but they suggest no specific remedy that would alleviate the problems they have identified other than SPACE's request for mandatory cross polarization.

5. The impact of reduced spacing on the type of services represented by the Group W and SPACE petitions was fully considered in *Reduced Orbital Spacing*.[8] It was concluded that at 2° spacing video service to small antennas was feasible, though marginal according to some submitted data, provided that receiving antenna equipment was upgraded.[9] We recognized that broadcast quality video would not occur with smaller antennas even at 4° spacing.[10] Because interference would be masked by thermal noise in such cases, it would be unrealistic to adopt overly strict interference criteria without recognition of these practical circumstances.[11]

6. With regard to SPACE's request for mandatory cross-polarization between adjacent satellites, it was our intent to require cross-polarization in any future orbit assignment plan which implements uniform 2° spacing in the 4/6 GHz band. However, because of the uncertainties surrounding the achievement of the desired levels of universal cross-polarization at

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[6] Satellite Syndicated Systems urges us to assign contiguous orbit locations to all satellites providing service to cable systems, but offers no practical suggestions regarding identification of these "cable" satellites or the implementation of its proposal.

[7] Technical analysis indicated that an improvement in antenna performance standards was necessary if 2° spaced operations are to be successful. None of the parties seek reconsideration of the immediate implementation of 2° spacings at 12/14 GHz.

[8] *See* paras. 27-30.

[9] *Id.* at para. 30.

[10] *Id.* at 13 n. 29. *See also American Broadcasting Companies, Inc.*, 62 FCC 2d 901, 925 (1976).

[11] Our action does not have the effect of reducing existing service and SPACE's reference to *C.J. Community Service, Inc. v. FCC*, 246 F.2d 660 (1957) is inappropriate. That case reversed a Commission finding that it could not, consistent with § 312 of the Communications Act, permit an unlicensed booster station to continue its operation, even though the station was providing a needed service and the Commission had failed to enact rules that would provide for the licensing of booster stations. Here we are attempting to increase satellite capacity and therefore expand service to the public.

this time, we provided a margin for less than ideal conditions by our transitional plan of 3°, 2.5° and 2° spacings announced in the *1983 Orbit Assignment Order.*[12] We intend to review the current conditions prior to adoption of a revised orbital assignment plan which would implement uniform 2° separations.[13]

7. Nothing in the petitions for reconsideration or the comments filed in response to our *Report and Order* causes us to question the feasibility of 2° spacing criteria at 4/6 GHz.[14] Moreover, the gradual implementation of 2° spacings at 4/6 GHz recognized concerns repeated here. This delay in implementation of uniform 2° spacings until future satellite launches is intended to provide the relief requested by these petitions. Nothing beyond mere speculation has been proffered to demonstrate that this remedy will not be sufficient to ease difficulties during the transitional stage.[15] All parties and future applicants must recognize that technical and economic adjustments will be necessary to attain reduced orbital spacings to assure future expansion of domestic satellite services.

III. Space Station Standards

8. In *Reduced Orbital Spacing* we set certain minimum technical standards with which future proposed satellites must comply. These standards included "full frequency re-use" in order to insure a minimal level of efficient orbit and spectrum utilization. Specifically, in the 12/14 GHz band, this criteria was defined as systems with the capability of providing the same transmission capacity between the earth stations as a 12/14 GHz satellite equipped with 20 transponders having 43 MHz bandwidth and 20 watt amplifiers.[16] We noted that all satellites currently under consideration would meet this standard with the exception of certain hybrid satellite proposals. Although we noted the possibility of obtaining a waiver of our standard, we warned that in the future hybrid satellites would have to meet the required technical standards of

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[12] *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service,* (hereinafter *1983 Orbital Assignment Order*) 94 FCC 2d 129 (1983).

[13] As recognized in *Reduced Orbital Spacing,* the Advisory Committee established today will investigate and make recommendations on spacecraft and earth station antenna measurement and verification standards necessary for accurate assessment and control of adjacent satellite interference levels under 2° spacing conditions.

[14] 94 FCC 129 (1983). We expressly recognized the unique situation of services distributing video and audio programming by provision of 3° transitional spacing for such systems. *Id.* at para. 10.

[15] The parties complain of increased costs to replace equipment in order to assure signal quality but have offered no data or analysis demonstrating what these actual costs will be. Without such information, we must conclude that our decision to implement 2° spacing within the originally articulated time parameters was sound.

[16] *See Reduced Orbital Spacing* at n. 67. The standards applicable to satellites at 4/6 GHz have not been questioned.

efficiency for each of the bands involved.[17]

9. American Satellite filed a petition for reconsideration which addresses two aspects of our technical definition of full frequency re-use. The first of these concerns useable bandwidth specifications. American Satellite proposed an interleaved channel system and contends that our standard of 860 out of 1000 MHz does not allow sufficient excess bandwidth to interleave cross polarized channels and mitigate internal interference. It asks that our standards be revised to require a useable bandwidth of 817 MHz and that satellites equipped with the equivalent of 19 as opposed to 20 transponders with a bandwidth of 43 MHz be deemed acceptable. Attached to its petition is an analysis showing that, despite the loss of one transponder, greater total throughput for high capacity digital transmissions is achieved with this interleaved system design of 19 transponders than with a 20 transponder design which is not fully interleaved.

10. American Satellite's second recommendation is that the total minimum power requirement for satellites operating in the 12/14 GHz band be lowered to 323 watts.[18] It contends that the current 400 watt requirement for a hybrid satellite results in a design that is too heavy for the normal launch vehicle and that the use of a larger vehicle would raise costs significantly. According to American Satellite, such costs would not be justified in light of the small amount of added power achieved.[19]

11. Ford Aerospace Satellite Services Corporation (Ford), in opposition to American Satellite's petition, argues that any relaxation of the standards would result in our authorization of inefficient satellites and would not be in the public interest.[20] In reply, American Satellite contends with regard to bandwidth requirements that Ford's arguments are simplistic and that Ford's alternate proposal offers no utilization advantages while entailing unnecessary additional costs. American Satellite claims that Ford's response to its power level proposal is again too simplistic and that Ford has equated reduction in power to reduction in utilization efficiency which it claims is subject to the characteristics of the service offered.

12. Our primary objective at this juncture is to achieve as efficient and effective utilization of the orbital arc as is reasonably feasible to satisfy growing demands for domestic satellite services as they arise. The

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[17] *Reduced Orbital Spacing* at para. 78.

[18] This would result in a standard reflecting its proposed satellite design with 19 transponders with 43 MHz bandwidth and 17 watt amplifiers.

[19] American Satellite estimates this additional power to be 0-15% depending on the type of service offered.

[20] Ford maintains that its pending hybrid satellite design corresponds to a minimum of 600 watts of power for a 24 transponder satellite and that American Satellite's proposal would result in a space station having almost 50 percent less transponder capacity.

establishment of our minimal frequency re-use standards for space stations is intended to promote efficient orbital utilization by eliminating from consideration satellite proposals that are clearly below state-of-the-art design as it existed when *Reduced Orbital Spacing* was decided.[21] However, we did not wish to define a frequency re-use standard that would arbitrarily eliminate a satellite design that would provide the same level of throughput capacity as the baseline designs we then had before us. American Satellite has demonstrated that its proposed interleaved channel system will offer at least as much total throughput as one conforming to our initial bandwidth specifications and will do so without significantly raising costs. We therefore accept this bandwidth formulation as being within the public interests of economy and efficiency.

13. However, American Satellite has not made a convincing showing that the transponder power standard should be reduced below 20 watts. In *Reduced Orbital Spacing* we expressly recognized that, while hybrid satellites may be cost effective for the operator, they have often been inefficient compared to two single band satellites.[22] Thus, we stated that hybrids must meet minimum threshold efficiency criteria in both bands including a transponder power standard of 20 watts.[23] This also has the desirable effect of increasing homogeneity of space stations operating at 2° spacing. By offering increased launch costs as its only justification for lowering the power standard, American Satellite fails to satisfy the concerns which prompted formulation of our original standards in terms of the state-of-the-art power criteria as it existed when *Reduced Orbital Spacing* was issued.[24] We therefore retain this 20 watt power aspect of our standard for "full frequency re-use" so that 19 transponders with a

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[21] Essentially, we found a compelling public interest in assuring minimally efficient orbit use, as characterized by the concept of "full-frequency reuse" quantified in an unambiguous fashion, in order to determine a satellite proposal's filing acceptability. Relative efficiency of proposals meeting this threshold standard could be compared in light of other public interest considerations. Since these criteria are only threshold standards for acceptability for filing, we treat the bandwidth and power aspects separately here for administrative convenience. However, we also recognize that the power-bandwidth product may be a better measure of orbit/spectrum efficiency when considered as an ultimate comparative criteria.

[22] *Reduced Orbital Spacing* at para. 78.

[23] *Id.* at para. 79; *See also id.* at p. 33, n.67.

[24] *See, e.g., Southern Pacific Communications Company,* 84 FCC 2d 650 (1981). We have long recognized the difficulties in applying our orbital assignment policies caused by hybrid satellites. Applicants are on notice that private cost and operational advantages of such hybrid designs will be given little weight when such orbital assignment difficulties arise or when they are compared to more efficient systems with greater transponder capacity. As pointed out by Ford Aerospace, hybrid satellite designs which fully satisfy our full frequency re-use standard are feasible if a larger and more costly launch vehicle is used.

bandwidth of 43 MHz and 20 watts of power each are required.[25]

IV. Antenna Performance Standards

14. In *Reduced Orbital Spacing,* certain revisions were made of the rules pertaining to transmit antenna performance standards as set out at 47 C.F.R. § 25.209. We recognized the potentially higher costs to earth station owners of conforming to these new regulations by the upgrade or replacement of existing antennas. However, we were convinced that improved antenna performance is the most effective way to achieve reduced orbital spacing. None of the parties seeking reconsideration dispute this conclusion or the feasibility of achieving general improvements in antenna sidelobe performance as required by our revised rules. Instead, modifications or clarifications of certain details of the provisions of Section 25.209 are requested to reduce unnecessary costs or to alleviate uncertainty caused to earth station licensees.

15. In adopting *Reduced Orbital Spacing,* we recognized the problems faced by manufacturers and operators of earth station equipment and we provided several methods to ease the transition to higher performance equipment. Initially, an implementation date of July 1, 1984 was set[26] for newly installed antennas to afford sufficient time for compliance. Existing equipment must conform to new standards by January 1, 1987. In addition, we indicated that a waiver procedure may be available[27] for a newly constructed antenna not meeting our standards and may be utilized where the operator can demonstrate by technical analysis that its use will not cause interference nor impede operations at 2° spacing.[28]

16. Various antenna manufacturers have submitted technical data demonstrating that our performance standards are achievable but will necessitate larger, more expensive equipment. In particular, SatCom Technologies, Inc. recommends that some form of antenna type accep-

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[25] Indeed, single band satellites using 40 watt transponders have apparently become the standard since the adoption of *Reduced Orbital Spacing,* as demonstrated by the designs proposed in the pending group of space station applications.

[26] This compliance date was delayed until this further order on reconsideration in order to spare users what may prove to be unnecessary expenses should these standards be changed. *Effective Date of the Revised Rules Concerning Earth Station Antenna Performance Standards for Newly Installed Antennas,* Mimeo No. 5082, released June 27, 1984.

[27] M/A-Com, Inc. criticizes the use of a waiver procedure because, in its view, it chills the market by discouraging customers, places a burden on the Commission's limited resources, and incurs time delays.

[28] Vitalink Communications Corporation (Vitalink) has already utilized this waiver request procedure contending that the new standards fail to take into account systems operating with small antennas. This request will be disposed of in another proceeding. Vitalink Communications Corporation, File No. 806-DSE-ML-84.

tance criteria be developed in order to standardize testing procedures. We will not resolve this issue here but believe it is appropriate for discussion by the Advisory Committee on Reduced Orbital Spacing established today by concurrent order.

17. Equatorial Communications, Inc. (Equatorial), although supporting the move to 2° spacing and the resulting necessity to accommodate this move with adoption of changes in earth station antenna performance standards, contends that the Commission's solution creates unintentional side effects. It proposes certain changes in the language of the rules which would recognize protection from terrestrial interference and would clarify the applicability of Section 25.209 of the rules. In addition, Equatorial argues that in order to promote innovation and technical advances the Commission should authorize operation of any non-conforming antenna where it can be demonstrated that it causes no harmful interference.[29]

18. Vitalink requests the Commission to modify its standards to require an antenna's performance envelope to begin at 2° off-axis as opposed to 1°. In making this request, Vitalink acknowledges that certain South American satellites are located with 1° of their United States' counterparts, which thus raises the possibility of interference problems. However, Vitalink also believes that such potential interference cases can be successfully resolved.

19. We see some merit in the issue raised by Equatorial concerning the revisions of Section 25.209. There is a possibility that the revised rule might be misread with respect to interference protection from terrestrial services. As recognized by SPACE and Equatorial, our optional receive-only licensing program[30] is oriented toward protection of receiving stations from terrestrial interference sources.[31] As a practical matter, the licensing of individual receiving earth stations addresses interference protection only from the specific terrestrial sources identified within the coordination distance contour of the earth station. Such a licensing process can not, however, afford to each individual licensee an absolute level of interference protection from any particular present or future orbital arrangement of satellites or r.f. carriers on them. To offer such protection would add an obligation to our optional licensing program

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[29] Several parties supported Equatorial's proposal including Public Broadcasting Service, Associated Press and M/A-Com, Inc. Satellite Business Systems prefers retention of the current standard pending further evaluation.

[30] *See Deregulation of Receive-Only Earth Stations,* 74 FCC 2d 205 (1979).

[31] Indeed, this was the original justification for the antenna pattern standard in Section 25.209. *See Earth and Terrestrial Stations,* 40 FCC 2d 395 (1972).

beyond its expectations or capabilities.[32] We did, however, consider the effects of adjacent satellite interference on a generalized or baseline receiving antenna facility conforming to the standards of Section 25.209(a) and (b) for baseline transmissions when our reduced orbital spacing criteria were adopted.

20. This generalized approach is a departure from the specific methodology employed in *American Broadcasting Companies*[33] where we examined receiving antennas on a case-by-case basis. Such an approach is no longer practical in light of the thousands of receiving earth stations that have now been licensed. Therefore, we will adopt an alternative formulation of Section 25.209(c) which reflects the fact that discrete interference protection provided by a license is only from terrestrial sources identified by the frequency coordination process and that the patterns of Section 25.209(a) and (b) are used only as reference patterns in our evaluation of the general effects on receiving earth stations caused by our orbital spacing and satellite location assignment decisions. As these standards will no longer be strictly applied, we will not require filing of receive antenna patterns or apply our small antenna licensing procedures on a case-by-case basis.[34] A strict analysis will continue to be applied to our evaluation of transmit antennas. We also adopt Equatorial's proposed revision of Section 25.209(e).

21. Comsat and Alascom request that we grandfather their existing transmit/receive antenna facilities with respect to the applicability of the new standard in 1987. Both parties were concerned with the costs occasioned by the necessity for premature replacement of existing equipment and with the significant disruption such replacement would entail. Alascom, Inc. requested that operations with its existing antennas be authorized for the duration of their useful life in order to avoid passing on higher costs to its customers who are already paying high rates for telephone service. In addition to high economic costs, Comsat was concerned with the potential disruption of existing antennas especially with regard to its international operations. As an alternative to a waiver procedure, it suggested "grandfathering" existing stations to avoid these problems.[35]

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[32] As characterized by M/A-COM, in its comments at 5, "[i]n practice, a license for a receive-only earth station is no more and no less than a grant of protection for interference due to future terrestrial microwave systems."

[33] 62 FCC 2d 901 (1977).

[34] *See, e.g., Trinity Broadcasting,* FCC 78-562 (released August 17, 1978) and *DeKalb Cable,* Mimeo No. 18156 (released June 7, 1979), which imposed responsibility for adjacent satellite interference levels on equipment choices made by the licensee.

[35] Comsat expressed confidence in its ability to obtain a waiver for its nondomestic service but preferred a "grandfathering" procedure.

22. In adopting *Reduced Orbital Spacing,* it was not our intent to require existing antennas to be modified simply for the sake of complying with the new standard. Instead, we indicated a liberal waiver policy to be implemented where non-conforming, existing antennas did not cause actual interference.[36] We believe that we can make our intent clearer with the revised text adopted here today. The revised rule will operate in the following manner. The new regulations will not go into effect until 30 days after publication of revised 47 C.F.R. § 25.209 in the Federal Register. After that date any newly authorized[37] antennas must comply with one of two requirements. These antennas must meet the strict sidelobe standard defined in 47 C.F.R. §§ 25.209(a) and (b)[38] or, in the alternative, demonstrate that its operation fully complies with 2° spacing.[39] In making such a demonstration, the operator must show that it has taken affirmative steps to overcome the failure of the antenna to meet the sidelobe standard.

23. Antennas authorized before the effective date may continue operations without modification until January 1, 1987. After that date, antennas must meet one of three requirements. They must either (a) comply with the strict sidelobe standards, (b) show their strict compatibility with 2° spacing as set forth above, or, (c) if unable to do either of these, an operator may continue to operate the antenna as long as it can be demonstrated that the use of its nonconforming antenna will not cause unacceptable interference.[40]

24. We believe that these adjustments to the rules will accommodate the interests of most parties. Specifically, by granting Equatorial's

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[36] Because the costs of manufacturing new antennas did not appear to be increased substantially by the new sidelobe standard, we did not intend to be as liberal with respect to waivers for new installations.

[37] In order to avoid any confusion, we are revising 47 C.F.R. § 25.209 to apply to antennas "initially authorized" as opposed to "installed." By this term, we mean a Commission action, such as the grant of a construction permit, Section 319(d) waiver or temporary authorization, for the specific facility. We feel that this change will obviate any difficulties in definition of the term "installed" and will provide more certainty in the rules' application.

[38] As part of its responsibilities, the Advisory Committee is encouraged to develop detailed test and verification procedures acceptable to the antenna manufacturing industry and users by which compliance with our sidelobe standards can be determined.

[39] Again, the Advisory Committee is encouraged to propose operational criteria to which existing licensees will simply certify rather than requiring separate justifications as to 2° spacing compatibility for each licensee. The methodology to be employed is that used in Appendices B and C to Reduced Orbital Spacing. The Committee should investigate and make any recommendations on inter-satellite coordination procedures necessary or desirable to supplement this analysis.

[40] 47 C.F.R. § 25.209(f). It will be an additional responsibility of the Advisory Committee to develop and recommend standards which, if met, will demonstrate this lack of interference potential.

request for an alternative showing of 2° compatibility, we recognize the problems arising from the operation of smaller antennas. According to data submitted in this proceeding,[41] large antennas can generally meet the new, stricter performance standard. Problems arise, however, with the use of smaller antennas of the Cassegrain design. Because such antennas will have to be reviewed under our small antenna licensing procedures in any event, we agree that a single technical analysis will be sufficient to routinely license such non-conforming antenna facilities with respect to potential inter-satellite interference.[42] In addition, by allowing after January 1, 1987, we have recognized and provided a solution for the problem raised by Comsat and Alascom regarding premature replacement of equipment.

25. Vitalink's proposal to begin the applicability of the performance envelope at 2° off-axis rather than 1° is less easily disposed of. The use of the 29-25 log θ pattern for international coordination has proven effective. While international coordination of specific facilities on a case-by-case basis is of course possible, we wish to avoid such case-by-case coordination requests in light of the delays such a procedure would cause in the initiation of service. Thus, we believe it preferable to retain the rule as it currently stands, i.e., to continue the 29-25 log θ pattern from 1° off-axis to simplify our international coordination efforts. However, we are modifying the rule as described above to indicate the conditions under which non-conforming antennas would be licensed. Thus, where this 1° criteria is not satisfied, applicants will be required to show non-interference to non-domestic satellites at 1° spacing before such facilities will be licensed, and grant authorizations may be delayed until any necessary international coordination has been completed.

V. Conclusion

26. The Commission's decision to reduce orbital spacings between domestic satellites was made after a careful balancing of the benefits resulting from expanded service capacity against increased costs and reduced design flexibility which may be incurred by satellite operators and equipment users. We took a variety of steps intended to minimize possible detrimental effects of our order and to facilitate transition to 2° spacings. Such steps included gradual reduction of spacings at 4/6 GHz, liberal time periods within which antenna equipment must be brought into conformity with revised performance standards, the availability of a

[41] *See, e.g.,* Satcom Technologies comments.

[42] *See, e.g., Schlumberger Technology Corporation,* Mimeo No. 4658 (released June 7, 1984); *Equatorial Communication Services,* Mimeo No. 2831 (released March 13, 1984). In such cases, conditions are attached that limit transmission parameters to those for which the necessary technical showings have been made.

waiver procedure where warranted, and continued emphasis of our desire for flexibility in shaping domestic satellite policies.

27. In today's action on reconsideration we have fully considered the arguments of all parties and have attempted to satisfy their particular concerns where doing so would not compromise our commitment to efficient operations at 2° spacings. There are, however, certain circumstances where our paramount concern for providing expanded capacity has outweighed private interests in order to insure growth in services offered to the public.

VI. Order

28. Accordingly, IT IS ORDERED that the petitions for reconsideration of *Reduced Orbital Spacing* listed in paragraph 2 above ARE GRANTED to the extent described herein and DENIED in all other respects.

29. IT IS FURTHER ORDERED that Section 25.209 of the Commission's Rules, 47 C.F.R. § 25.209, IS MODIFIED as specified in the Appendix, and the modified rule will become effective February 15, 1985.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

47 C.F.R. § 25.509 Antenna Performance Standards

47 C.F.R. § 25.209 is amended by revising paragraphs (c), (d) and (e) and by adding a new (f) to read as follows:

(c) Earth station antennas licensed for reception of radio transmissions from a space station in the fixed-satellite service are protected from radio interference caused by other space stations only to the degree to which harmful interference would not be expected to be caused to an earth station employing an antenna conforming to the referenced patterns defined in paragraphs (a) and (b) above, and protected from radio interference caused by terrestrial radio transmitters identified by the frequency coordination process only to the degree to which harmful interference would not be expected to be caused to an earth station conforming to the reference pattern defined in subparagraph (a)(ii) above.

(d) The patterns specified in paragraphs (a) and (b) above shall apply to all new earth station antennas initially authorized after February 15, 1985 and shall apply to all earth station antennas after January 1, 1987.

(e) The operations of any earth station with an antenna not conforming to the standards of paragraphs (a) and (b) above shall impose no limitations upon the operation, location or design of any terrestrial station, any other earth station, or any space station beyond those limitations that would be expected to be imposed by an earth station employing an antenna conforming to the reference patterns defined in paragraphs (a) and (b) above.

(f) An earth station with an antenna not conforming to the standards of paragraphs (a) and (b) above will be routinely authorized after February 15, 1985 upon a finding by the Commission that unacceptable levels of interference will not be caused under conditions of uniform 2° orbital spacings. An earth station antenna initially authorized on or before will be authorized by the Commission to continue to operate as long as such operations are found not to cause any unacceptable levels of adjacent satellite interference. In either case, the Commission will impose appropriate terms and conditions in its authorization of such facilities and operations.

Equipment Authorization Program
Equipment Industrial, Scientific and Medical
Investigation Authority to Conduct
Radio Frequency Device, Authorization
Technical Requirements

Notice of Proposed Rule Making adopted recommending Parts 2 and 18 of the Rules be changed to eliminate burdensome and obsolete regulations and implement a new equipment authorization program for industrial, scientific, and medical (ISM) equipment, and provide technical standards for four new ISM frequency bands.

—*Revision of Parts 2 and 18*

GEN. Docket No. 20718

FCC 84-578

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Overall revision of Part 18 governing Industrial, Scientific, and Medical equipment	GEN Docket No. 20718

THIRD NOTICE OF PROPOSED RULE MAKING

Adopted: November 21, 1984; Released: November 29, 1984

BY THE COMMISSION:

Introduction

1. Notice is hereby given of the Commission's intent to amend its Rules concerning the operation of industrial, scientific, and medical (ISM) equipment. The purpose of this proceeding is to eliminate burdensome and obsolete rules governing ISM equipment and to simplify the applicable authorization and administrative requirements under Parts 2 and 18.

2. Under Sections 2.1 and 18.3 of the Rules, ISM equipment is defined as "any device operating above 10 kHz using radio waves for industrial, scientific, and medical or any other purposes including the transfer of energy by radio and which are neither used nor intended for radio communication". This definition includes a diversity of equipment using quite different methods of generating radio frequency (RF) energy at any frequency and power level for scientific, industrial as well as residential

applications. Examples are microwave ovens, industrial heaters, glue machines used in factories, X-Ray equipment, ultrasonic room humidifiers, RF stabilized arc welders, induction cooking ranges, electrosurgical units, and particle accelerators.

Background

3. About 35 years ago, the Commission promulgated rules under Part 18, to control the interference potential of ISM equipment to radiocommunication services. Typical ISM equipment, at that time, included large industrial, scientific or medical machines generating high power and operating on any very low frequency, whose operation therefore, was a source of interference to established services. The standards adopted by the Commission were, in essence, suited for classical ISM equipment (relatively high powered industrial, scientific, and medical). These standards were later applied to consumer products, such as microwave ovens, but due to the proliferation of such equipment might not be appropriate in the coming years to protect authorized and licensed services.

4. In an attempt to review the administrative and technical requirements, especially for proliferating consumer devices, in view of technological advancement, the Commission, six years ago, initiated this rulemaking. The major steps in that proceeding were two notices of proposed rule making[1]. The first *Notice* basically proposed revised radiation limits and new administrative provisions whereas the second one recommended more detailed methods of measurements. Respondents favored amendments of the administrative provisions but opposed the proposed emission limits because they were judged to be too severe and unprecedented in view of the low number of interference cases in the United States from the operation of ISM equipment. Major manufacturers and operators of large industrial machinery also commented on the economic impact of implementing such technical standards. They argued that extensive and costly modifications in the design of their products would have to be undertaken to meet the new requirements, thereby increasing not only their selling price but also their maintenance cost.

5. The CISPR and CCIR IWP 1/4 [2], two major international organizations concerned with technical standards, have recognized the possible inadequacy of the technical standards for certain ISM equipment in the future and are revising them, as a result of Resolution 63 of the 1979

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[1] *Notice of Proposed Rule Making,* 43 FR 46326, October 6, 1978. *Second Notice of Proposed Rule Making,* 44 FR 9771, February 15, 1979.

[2] CISPR is the French acronym for the International Special Committee on Radio Interference (under the International Electrotechnical Commission). CISPR Publication 11 contains the technical standards on ISM equipment. CCIR is the French acronym for the International Radio Consultative Committee. CCIR IWP 1/4 is a study group in charge of developing technical standards for ISM equipment.

Geneva World Administrative Radio Conference (WARC). Studies by CCIR are still in progress. International standards are expected to be recommended to member countries of the CCIR when the project is completed. Another consequence of the Final Acts of the 1979 WARC was the addition of four bands in the table of allocations for ISM equipment. These bands have already been recognized in Part 2 of the Commission's Rules through the *Report & Order* in Docket No. 80-739, 49 FR 2357, January 19, 1984.[3] The use of these supplemental frequencies should be consistent with the recommendations of CCIR.

6. In previous actions in this docket, technical standards were adopted to provide for the operation of induction cooking ranges and the burdensome administrative requirement of filing FCC application Form 724 was deleted[4]. Furthermore, on August 5, 1983, the Commission released an *Order Granting Limited Waiver,* FCC 83-361, to exempt RF lighting devices from the recertification requirement of Section 18.142(c). This waiver authorizes the limited manufacture and marketing of RF lighting devices provided they meet the same technical standards as computing devices under Subpart J of Part 15. A companion *Notice of Inquiry* in General Docket No. 83-806, 48 FR 37235, August 17, 1983, was released on the same date by the Commission requesting comments on the suitability of the computing devices technical rules for RF lighting devices.

Reasons for further NPRM

7. As a consequence of the proliferation of ISM equipment, particularly for consumer use, in the thirty years since it was adopted, certain deficiencies have developed in Part 18. The text and the equipment authorization requirements have become both intricate and, to some extent, confusing. The rules are lengthy, sometimes contradictory, and difficult for the public to understand. As already mentioned above, the technical standards in Part 18 were originally adopted primarily for large industrial, scientific, and medical machines. These standards may, therefore, not always be suitable for more recent consumer devices which, for the most part, operate under similar conditions to medical diathermy equipment.

8. We are, therefore, issuing a third Notice of Proposed Rule Making to address these problems and, to the extent possible, offer solutions to them. We base this *Notice* on comments received from the public regarding proposed changes to the administrative requirements in the two

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[3] The four new ISM bands which have been allocated worldwide are the following: 6.78 MHz ± 15.0 kHz, 61.25 GHz ± 250.0 MHz, 122.5 GHz ± 5.0 GHz, and 245.00 GHz ± 1.0 GHz.

[4] *Docket 20718. First Report & Order,* 44 FR 48178, August 17, 1979 (adopting regulations for induction cooking ranges). *Second Report & Order,* 48 FR 51302, November 8, 1983 (deleting the requirement for filing FCC Form 724).

Notices in this Docket and that simpler equipment authorization procedures, such as verification and notification, have recently been established by the Commission. These procedures were instituted to facilitate the marketing of certain consumer RF devices, such as television receivers and low power transmitters, and were not incorporated in Part 18; they should be implemented into Part 18 to relieve the public of certain burdensome administrative requirements.[5] For further details on the diverse equipment authorization procedures (certification, type approval, etc.) implemented by the Commission, see Part 2, Subpart J of the Rules, 47 CFR Sections 2.901 *et seq.*

Technical Standards

9. The general technical standards for ISM equipment are currently under review by the Commission's staff as well as CCIR IWP 1/4 and CISPR in the hope of better understanding the interference potential of ISM equipment and possibly establishing more uniform limits. Because of the complexity and the time involved in reanalyzing the limits for ISM equipment, we propose that the present limits be retained, pending further development in our studies. Action to revise the technical standards at this time is thus held in abeyance. However, there are three technical issues which we feel should be addressed in this proceeding: temporary requirements for RF lighting devices, the addition of four new ISM bands, and the consolidation on the methods of measurements.

10. RF lighting devices may be marketed under a waiver of the three-year re-certification requirement of Section 18.142(c), provided they meet the same technical standards as computing devices. Most manufacturers, in their comments in General Docket 83-806, which deals with the revision of the technical standards on RF lighting devices, support the regulations established by the Commission in the *Order Granting Limited Waiver.* We are, in this proceeding, proposing to delete the three-year re-certification requirement wherever it appears at the present time in Part 18. Consequently, we are herein also proposing that RF lighting devices, marketed under the new rules, should temporarily continue to meet the technical standards established for computing devices under Part 15, Subpart J of the Rules, pending further action in Docket 83-806.

11. We propose to implement into Part 18 the four new ISM frequencies adopted in the *Report & Order* in Docket 80-739. Operation on these new ISM frequencies, will be subject to the present technical

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[5] Verification was implemented through the *Report & Order* in General Docket 80-284, 46 FR 23240, April 24, 1981, (dealing with the methods of measurements for computing devices). Notification was adopted in the *Report & Order* in General Docket 82-242, 48 FR 3614, January 26, 1983, but actually put in effect through the *Report & Order* in General Docket 83-10, 49 FR 3991, February 1, 1984.

standards. Comments are requested on the suitability of adopting the current Part 18 technical requirements for these new ISM bands.

12. The current measurement procedures for ISM equipment are specified in Part 18 as well as various bulletins. We propose to consolidate all of the several procedures into a single document and establish a basic method of measurement, to the extent possible. Furthermore, we believe that revising the measurement procedures is necessary in order to reflect the development in measuring techniques and instrumentation in the past decades and better assist the public. The new methods, contained in Appendix B of this document, give basically additional guidelines to the public and are based on the practices of the FCC laboratory. The major change in these methods is the permissible alternate use by the public of an attenuation law factor of 1/d (where d is the distance at which the field strength is being measured) to the extrapolation methods utilized by the Commission. These procedures should be followed, to the extent practicable, by the public when testing is required or requested by the Commission.

Equipment Authorization Program

13. The complexity of the current equipment authorization program for ISM equipment does not allow for the best possible service to the public. We note that the primary difficulties in comprehending Part 18 are due to (a) inconsistent definitions of terms used to specify an equipment authorization program, and (b) the multiple authorization programs used for the same type of equipment. The following three equipment authorization procedures are currently used to regulate ISM equipment: 1) type approval, 2) on-site certification, and 3) prototype certification. However, the term "certification" under Part 18 does not represent the same type of procedure as in Part 2, Subpart J of the Rules.

14. Under type approval, a grant of equipment authorization is issued by the Commission based on examination and measurement of one or more sample units at its laboratory. Although this procedure is permitted for the majority of ISM equipment, it is, in practice, applied mostly to consumer products. Type approval is impractical for equipment too large to be shipped to the FCC laboratory or equipment for which operating conditions may not be simulated at the FCC laboratory (this represents the majority of classical ISM equipment). It should be reserved for devices which are difficult to test but which can still be evaluated at an open field test site or equivalent. For the moment, only domestic microwave ovens seem to merit type approval as an equipment authorization procedure because of the difficulty in evaluating such devices. The major problem in testing microwave ovens is the maintenance of, and lack of suppliers for the aging measuring instrumentation. New methods of measurements fo

domestic microwave ovens are currently being developed at the FCC laboratory.

15. On-site certification requires that a qualified party test a device at the user's premises, that measurements be made occasionally to assure continued compliance and that records of the test results be kept. No samples of units need to be submitted to the Commission, unless requested. Records are to be presented to the Commission only upon request. On-site certification has the same intent as verification, except that it does not attach to subsequent models and testing must be made at the installation. On-site certification is usually applied to one-of-a-kind equipment. We propose that on-site certification be changed to verification for one-of-a-kind equipment; we also propose to delete the requirement, in Section 18.117 for industrial heating equipment specifically, to affix or post a copy of the certificate to the equipment or in a location readily available to representatives of the Commission. We also propose to add ultrasonic devices generating less than 500 watts and operating below 90 kHz to the verification category. Ultrasonic equipment generating less than 500 watts and operating at a frequency below 90 kHz is exempt, under the provisions of Section 18.71, from type approval or certification. This implies that such ultrasonic equipment is in fact subject to verification and it should thus be stated in the rules. The term verification is not expressed in the rules because such an equipment authorization program was not in effect at the time Section 18.71 was promulgated.

16. Prototype certification is similar to certification as defined under Part 2, Subpart J. A grant of equipment authorization is issued by the Commission based on representation and test data submitted by the applicant. The Commission may require the applicant to submit one or more sample of units for further testing. Certification attaches to all subsequently produced units which are identical. However, certification should not be instituted for all ISM equipment, in view of the low number of interference cases from ISM equipment. Such action would be unduly restrictive and should be limited to ISM equipment most capable of causing interference, that is, consumer products. Certification for classical ISM equipment would still require manufacturers to file very extensive and detailed reports of measurements. Notification, which imposes the same conditions as certification except for the requirement to present the Commission with test data, would be more adequate for classical ISM equipment because of their minimal interference potential, as a marketing prerequisite. Notification would still provide the Commission with enough information on a particular system, and would reduce the amount of paperwork and time involved in filing for equipment authorization. Under notification and certification, devices would still

have to be tested as a condition for obtaining a grant of equipment authorization from the FCC.

17. In summary, we are proposing the following equipment authorization program for ISM equipment:

1) notification for all ISM equipment, unless otherwise specified below:
2) certification for consumer ISM equipment;
3) verification for ultrasonic equipment generating less than 500 Watts and operating below 90 kHz, and for one-of-a-kind equipment;
4) continuation of type approval for domestic microwave ovens.

Other Burdensome and Obsolete Rules

18. This section deals with all other regulations which we believe burdensome and obsolete and which have not been covered above. We shall address basically questions on the marketing rules under Part 2 and the operating conditions under Part 18 concerning licensing, labeling, etc.

A. Part 2

19. Section 2.809 permits the marketing of certain ISM devices before obtaining an equipment authorization from the Commission. However, the equipment may not be operated until authorization from the Commission is received. Since we propose to adopt such procedures as verification and notification for most of the equipment covered under the exemption, Section 2.809 can be deleted from the rules without any counteractive effects such as marketing delay. The processing time at the FCC laboratory for an application for notification is currently estimated to be approximately one month. This would not cause any major delay in the marketing of equipment covered under Section 2.809. Sections 2.1037 and 2.1039 discuss the procedures for prototype certification and on-site certification, and should be deleted from the rules, in view of the changes proposed above for the equipment authorization program.

B. Part 18

20. When the rules for ISM equipment were first implemented, only licensed services were allowed by the Commission. Section 18.21 of Part 18 assumes that ISM equipment, in order to be operated without a license, should meet the technical standards set forth and that operation under any other terms should be licensed. However, licensing of ISM devices, if necessary, can only be made under Part 5 of the Rules on an experimental basis. Furthermore, the Commission has never issued a license for ISM equipment for non-experimental purposes. From this fact, one can conclude that the contents of Section 18.21 specifying the conditions for licensed operation are obsolete. The provisions of all other Sections (18.22 through 18.29) of Part 18 dealing with the licensed operation of ISM equipment also are considered obsolete.

21. The major burden under Part 18 is the three-year re-certification requirement under Section 18.142(c) for equipment operating on non-ISM frequencies. Such a regulation was implemented in order to enforce the rules more intensively and to insure continuing compliance. However, this requirement has had an unnecessarily adverse economic impact on many manufacturers and has impeded application processing by the Commission.

22. Under Section 18.125 which specifies the procedures for applying for prototype certification for industrial ISM equipment, paragraph (c) allows the manufacturer to label the equipment. Since most manufacturers choose not to attach this optional label on their devices, it seems that such a regulation is ineffective and can be deleted. However, this does not prohibit a manufacturer/vendor from labeling his equipment if he desires.

Restructure of Part 18

23. The structure of Part 18 has become cumbersome and intricate and should be reviewed. Part 18 is currently divided into 9 Subparts of which two are reserved. Subpart A deals with general conditions of operation and definitions. The remaining subparts are structured in accordance with the different types of ISM equipment and discuss technical standards and measurement techniques. In order to simplify the structure of Part 18, we propose to revise it by taking into consideration, to the extent possible, the key elements involved in establishing rules. Part 18 would, therefore, be divided into only 3 subparts as follows: 1) The general operating conditions and administrative provisions, 2) the applications and authorizations, and 3) the technical standards. The text would thus be shortened considerably, about 40%, by avoiding repetition especially when discussing administrative provisions. This would diminish the cost of publishing the rules by a considerable amount.

24. The methods of measurements would be published separately in the form of a bulletin, entitled MP-5 "Methods of Measurements for Industrial, Scientific, and Medical Equipment". OCE Bulletin 20, dealing with the methods of measurements on microwave ovens is being incorporated in MP-5. See Appendix B of this document.

Enforcement

25. By extending the use of certification, notification, and verification, as defined under Part 2, to ISM equipment we are facilitating the authorization program. Since the Commission will not be testing most pieces of equipment prior to their authorization through the program, we are planning to implement a sampling program to assure continued compliance. The sampling program which was discussed in the *Report & Order* in General Docket No. 83-10, released January 26, 1984, 49 FR 3991, February 1, 1984, will be used to determine continued compliance

with the appropriate regulations. When non-compliance is found, the Commission, under authority of the Communications Act of 1934, 47 U.S.C. Sections 501 to 503, may issue monetary forfeitures and prosecute violators of these regulations. We expect to enforce the rules rigorously to deter the entry of non-complying equipment into the marketplace.

Procedural Matters

26. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.* the Commission issues the following initial regulatory flexibility analysis:

I. Reason for action

The administrative rules governing ISM equipment have become complex and too difficult to implement for certain devices.

II. The objective

The objective is to reduce the amount of time needed for an applicant to obtain an equipment authorization while, at the same time, allowing the Commission some flexibility with its staff resources. A sampling program will also be instituted to strengthen the equipment authorization program.

III. Legal basis

Action proposed is in accordance with Sections 4(i), 302(a), 303(g), and 303(r) of the Communications Act of 1934, as amended.

IV. Entities affected; nature of economic impact; significant alternatives

The proposed changes in the regulations would affect a number of entities both large and small. An estimate of the number of such entities affected is not obtainable. ISM equipment suppliers, importers and manufacturers will not have to file large volumes of paperwork formerly required for certain devices and could begin marketing equipment at an earlier date. Equipment testing laboratories should experience no effect as we shall still require ISM equipment to be tested to show compliance with the regulations, as a marketing prerequisite. It is therefore felt that any impact from this proceeding would be beneficial to those affected.

V. Recording, record-keeping and other compliance requirements

The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will decrease burden hours imposed on the public.

27. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of

proposed rule making until the time that a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules 47 C.F.R. Section 1.1231.

28. Pursuant to the applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before January 7, 1985, and reply comments on or before January 22, 1985. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N. W., Washington, D.C. 20554. For further information on this proceeding, contact Liliane M. Volcy, Office of Science & Technology, (202) 653-8247.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

A. Part 2 of the Rules (47 CFR Part 2) is amended as follows:

1. Sections 2.809, 2.1037 and 2.1039 are deleted.

2. Paragraph (b) of Section 2.1033 is amended to read as follows:

Section 2.1033 Application for certification.

* * * * *

(b) The application shall be accompanied by the report of measurements, and such other attachments as specified in the rules governing that particular equipment.

* * * * *

B. Part 18 (47 CFR Part 18) is amended to read as follows:

CONTENTS—Part 18

Subpart A - General information

Sec.
18.101 Basis and purpose.
18.103 Organization and applicability of the rules.
18.105 Other applicable rules.
18.107 Definitions.
18.109 General technical requirements.
18.111 General operating conditions.
18.113 Inspection by Commission representatives.
18.115 Elimination and investigation of harmful interference.
18.117 Report of interference investigation.
18.119 Importation.

Subpart B - Applications & Authorizations

18.201 Scope.
18.203 Equipment authorization.
18.205 Description of measurement facilities.
18.207 Technical report.
18.209 Identification of authorized equipment.
18.211 Information to the user.

Subpart C - Technical standards

18.301 Operating frequencies.
18.303 Prohibited frequency bands.
18.305 Radiation limits.
18.307 Conduction limits.
18.309 RF lighting devices.
18.311 Methods of measurements.

Subpart A - General information

Section 18.101 Basis and purpose.

The rules in this part, in accordance with the applicable treaties and agreements to which the United States is a party, are promulgated under Section 302 of the Communications Act of 1934, as amended, vesting the Federal Communications Commission with authority to regulate industrial, scientific, and medical equipment that emits electromagnetic energy on frequencies within the radio frequency spectrum in order to prevent any substantial amount of interference to authorized radio communication services. This part sets forth the conditions under which the equipment in question may be operated.

Section 18.103 Organization and applicability of the rules.

The rules in this part are divided into the following subparts:

(a) Subpart A contains general information and definitions for use in this part.

(b) Subpart B describes the procedures and requirements for authorization to market or operate ISM equipment under this part.

(c) Subpart C contains the technical standards for industrial, scientific, and medical equipment.

Section 18.105 Other applicable rules.

Other Commission rule parts of importance that should be referred to with respect to authorizations and operations of industrial, scientific, and medical equipment include the following:

(a) Part 0 describes the Commissions's organization and delegations of authority. This part also lists available Commission publications, standards and procedures for access to Commission records, and location of Commission field offices.

(b) Part 1 contains the rules of practice and procedure for adjudicatory proceedings including hearing proceedings; procedures for reconsideration and review of the Commission's actions; provisions concerning violation notices and for forfeiture proceedings; and the requirements for environmental impact statements.

(c) Part 2 contains special requirements in international regulations, agreements, treaties, and the table of frequency allocations. This part also contains standards and procedures concerning the marketing, the equipment authorization, and the importation of radio frequency devices into the United States.

Section 18.107 Definitions.

(a) Radio frequency (RF) energy. Electromagnetic energy at any frequency in the radio spectrum between 10 kHz and 3,000,000 MHz.

(b) Harmful interference. Any emission, radiation or induction which endangers the functioning of a radionavigation service or other safety services or seriously degrades, obstructs or repeatedly interrupts a radio communication service operating in accordance with this chapter.

(c) Industrial, scientific, and medical (ISM) equipment. Devices operating above 10 kHz which use radio waves for industrial, scientific, and medical or any other purposes including the transfer of energy by radio and which are neither used nor intended to be used for radio communication.

(d) ISM frequency. A frequency assigned by this part for the use of ISM equipment. A specified tolerance is associated with each ISM frequency (See Section 18.301).

(e) Marketing. As used in this part, marketing shall include sale or lease, offer for sale or lease, advertising for sale or lease, the import or shipment or other distribution for the purpose of sale or lease or offer for sale or lease. (See Subpart I of Part 2 of this Chapter).

Note: In the foregoing, sale (or lease) shall mean sale (or lease) to the user or a vendor who in turn sells (or leases) to the user. Sale shall not be construed to apply to devices sold to a second party for manufacture or fabrication into a device which is subsequently sold (or leased) to the user.

(f) Industrial heating equipment shall include any apparatus which utilizes a radio frequency oscillator or any other type of radio frequency generator and transmits radio frequency energy used for or in connection with industrial heating operations utilized in a manufacturing or production process.

(g) Medical diathermy equipment shall include any apparatus (other than surgical diathermy apparatus designed for intermittent operation with low power) which utilizes a radio frequency oscillator or any other type of radio frequency energy used for therapeutic purposes.

(h) Ultrasonic equipment shall include any apparatus which generates radio frequency energy and utilizes that energy to excite or drive an electromechanical transducer for the production of sonic or ultrasonic mechanical energy for industrial, scientific, medical or other noncommunication purposes.

(i) General ISM equipment shall include apparatus other than that defined in or excepted by paragraphs (f), (g), and (h) of this section in which radio frequency energy is applied to materials to produce physical, biological, or chemical effects such as heating, ionization of gases, mechanical vibrations, hair removal and acceleration of charged particles which do not involve communications or the use of radio receiving equipment.

(j) Consumer ISM equipment shall include any apparatus used or intended to be used by the general public in a residential environment.

Section 18.109 General technical requirements.

ISM equipment shall be designed and constructed in accordance with good engineering practice with sufficient shielding and filtering to provide adequate suppression of emissions on frequencies outside the frequency bands specified in Section 18.301.

Section 18.111 General operating conditions.

(a) Persons operating ISM equipment, for which a grant of equipment authorization is required under this part, shall not be deemed to have any vested or recognizable right to the continued use of any given frequency, by virtue of any prior equipment authorization.

(b) Subject to the exceptions in paragraphs (c) and (d) of this section and irrespective of whether the equipment otherwise complies with the rules in this part, the operator of ISM equipment that causes harmful interference to any authorized radio service shall promptly take whatever steps may be necessary to eliminate the interference.

(c) The provisions of paragraph (b) of this section shall not apply in the case of interference to an authorized radio station or a radiocommunication device operating on an ISM frequency (including tolerance).

(d) The provisions of paragraph (b) of this section shall not apply in the case of interference to a receiver arising from direct intermediate frequency pickup by the receiver of the fundamental frequency emissions of ISM equipment operating on an ISM frequency (including tolerance) and otherwise complying with the requirements of this part.

Section 18.113 Inspection by Commission representatives.

Upon request by a representative of the Commission the manufacturer, owner or operator of any piece of ISM equipment shall make the equipment available for inspection and promptly furnish the Commission with such information as may be required to indicate the capability of the equipment with regard to compliance with this Part.

Section 18.115 Elimination and investigation of harmful interference.

(a) The operator of ISM equipment that causes harmful interference to radio services shall promptly take appropriate measures to correct the problem.

(b) If the operator of ISM equipment is notified by the Commission's Engineer in Charge (EIC) that operation of such equipment is endangering the functioning of a radionavigation or safety service, he or she shall immediately cease operating the equipment. Operation may be resumed on a temporary basis only for the purpose of eliminating the harmful interference. Operation may be resumed on a regular basis only after the harmful interference has been eliminated and approval from the Commission obtained.

(c) When notified by the EIC that a particular installation is causing harmful interference, the operator or manufacturer shall arrange for an engineer skilled in interference measurements and control techniques to make an investigation to ensure that the harmful interference has been eliminated. The Commission may require the engineer making the investigation to furnish proof of his or her qualifications.

(d) The results of the investigation required by paragraph (c) of this section shall be reported to the EIC of the local district office.

Section 18.117 Report of interference investigation.

(a) An interim report on the investigation and of the corrective measures that were taken shall be filed with the Engineer in Charge of the local FCC office within 30 days of notification of harmful interference. The final report shall be filed with the Engineer in Charge within 60 days of notification.

(b) The date for filing the final report may be extended by the Engineer in Charge when additional time is required to put into effect the corrective measures or to complete the investigation. The request for extension of time shall be accompanied by a progress report showing what has been accomplished to date.

Section 18.119 Importation.

ISM equipment shall be refused entry or withdrawal for consumption into the Customs territory of the United States, unless accompanied by a copy of FCC Form 740, in accordance with the provisions of Subpart K, Part 2 of this chapter.

Subpart B - Applications & Authorizations

Section 18.201 Scope.

This subpart contains the procedures and requirements for authorization to market or operate ISM equipment under this part.

Section 18.203 Equipment authorization.

(a) ISM equipment, unless otherwise specified, shall be subject to notification in accordance with the relevant sections in Subpart J, Part 2 of this chapter.

(b) ISM equipment for use by the general public shall be subject to certification prior to use or marketing. An application for certification on FCC Form 731 shall be filed with the Commission, pursuant to the relevant sections in Subpart J, Part 2 of this Chapter and shall also be accompanied by:

(1) A description of measurement facilities pursuant to Section 18.205 or have such information on file with the laboratory of the Commission.

(2) A technical report pursuant to Section 18.207.

(3) A report of measurements pursuant to Sections 18.207 and 18.311.

(c) One-of-a-kind ISM equipment and ultrasonic equipment generating less than 500 watts and operating below 90 kHz shall be subject to verification in accordance with the relevant sections in Subpart J, Part 2 of this chapter.

(d) Domestic microwave ovens shall be type approved before use or marketing. An application for type approval on FCC Form 731 shall be filed with the Commission, pursuant to the relevant sections in Subpart J, Part 2 of the Rules.

Section 18.205 Description of measurement facilities.

(a) Any party making measurements to be filed for a device subject to certification under this part, shall submit a description of the measurement facilities to the Commission.

(b) The description shall include the following information:

(1) Location of test site.

(2) Physical description of the test site accompanied by photographs 8″ x 10″ in size. Photographs smaller than 8″ x 10″ will be acceptable if mounted on paper 8″ x 10″ and of sufficient clarity.

(3) Scaled drawing showing the dimensions of the site, the physical layout of supporting structures and all structures within 5 times the distance between the measuring set and the device under test.

(4) Description of structures used to support the device being measured and the test instrumentation.

(5) List of measuring equipment used and information concerning the calibration of the measuring equipment, i.e. when the equipment was last calibrated and frequency of calibration.

(6) A statement indicating whether this facility is available to do measurement work for others on a contract basis.

(c) This information shall be kept current at all times.

Note: OST Bulletin 55, "Characteristics of Open Field Test Sites", provides further guidance on open field test sites and site attenuation.

Section 18.207 Technical report.

When required by the Commission a technical report shall include as a minimum the following information:

(a) A copy of the installation and operating instructions furnished to the user. A draft copy of such instructions may be submitted with the application, provided a copy of the actual document to be furnished to the user is submitted as soon as it is available, but no longer than 60 days after the grant of the application.

(b) A statement of the rated technical parameters that includes:

(1) A block and schematic diagram of the circuitry.

(2) Nominal operating frequency.

(3) Maximum RF energy generated.

(4) Electrical power requirements of equipment.

(5) Any other pertinent operating characteristics.

(c) A report of measurements, including a list of the measuring equipment used and a statement of the date when the measuring equipment was last calibrated and when the measurements were made. See also Section 18.311.

(d) The frequency range that was investigated in obtaining the report of measurements.

Section 18.209 Identification of authorized equipment.

(a) Each device for which a grant of equipment authorization is issued under this part shall be identified and labeled pursuant to the applicable provisions of Subpart J of Part 2 of this chapter.

(b) Changes in the identification of authorized equipment may be made pursuant to Section 2.933 of Part 2 of this chapter.

Section 18.211 Information to the user.

Information shall be provided to the user in the instruction manual for any type of ISM equipment about:

—The interference potential of the device or system

—Maintenance of the system

—Simple measures that can be taken by the user to correct the interference.

Subpart C - Technical standards

Section 18.301 Operating frequencies.

ISM equipment may be operated on any frequency above 10 kHz except as indicated in Section 18.303. The following frequency bands, in accordance with Section 2.106 of the Rules, are allocated exclusively for use by ISM equipment:

ISM frequency		*Tolerance*	*Notes*
6.78 MHz	±	15.0 kHz	(1)
13.56 MHz	±	7.0 kHz	(1)
27.12 MHz	±	160.0 kHz	(1)
40.68 MHz	±	20.0 kHz	(2)
915 MHz	±	13.0 MHz	(3)
2,450 MHz	±	50.0 MHz	(1)
5,800 MHz	±	75.0 MHz	(1)
24,125 MHz	±	125.0 MHz	(1)
61.25 GHz	±	250.0 MHz	(1)
122.50 GHz	±	5.0 GHz	(1)
245.00 GHz	±	1.0 GHz	(1)

Notes:

(1) Frequencies allocated worldwide.

(2) Frequencies allocated worldwide except in the United Kingdom and Italy.

(3) Frequencies allocated in North and South America only (ITU Region 2).

Section 18.303 Prohibited frequency bands.

Operation of ISM equipment on the following frequency bands, which are allocated for safety, search and rescue operations, is prohibited: 490-510 kHz, 2170-2194 kHz, 8354-8374 kHz, 121.5 MHz, 156.8 MHz and 243 MHz.

Section 18.305 Radiation limits.

(a) ISM equipment operating on a frequency specified in Section 18.301 is permitted unlimited radiated energy in the band specified for that frequency.

(b) Radiated emissions from ISM equipment that lie outside the bands specified in Section 18.301 shall not exceed the following limits:

Equipment	*Operating frequency*	*Power (watts)*	*Field strength uV/m*	*Distance (meters)*
General	any ISM frequency	below 500	25	300
		on or above 500	$25\sqrt{\frac{\text{power}}{500}}$ (1)	300
	any non-ISM frequency	below 500	15	300
		on or above 500	$15\sqrt{\frac{\text{power}}{500}}$ (1)	1600
Industrial heaters and RF stabilized arc welders	on or below 5725 MHz	any	10	1600
	above 5725 MHz	any	reduced to the greatest extent possible	
Medical diathermy	any ISM frequency	any	25	300
	any non-ISM frequency	any	15	300
Ultrasonic	belowz 90 kHz	below 500	$\frac{2400}{\text{F (kHz)}}$	300
	490 to 1600 kHz	on or above 500	$\frac{2400}{\text{F (kHz)}}\sqrt{\frac{\text{power}}{500}}$ (2)	300
	non-ISM frequencies above 1600 kHz	any	$\frac{24000}{\text{F (kHz)}}$	30
	non-ISM frequencies above 1600 kHz	any	15	30
Induction cooking ranges (3)	below 90 kHz	any	1500	30
	on or above 90 kHz	any	300	30

Notes:

(1) Field strength may not exceed 10 uV/m at 1600 meters. Equipment used predominantly in residential areas and operating below 1000 MHz are not permitted the increase in field strength.

(2) Field strength may not exceed 10 uV/m at 1600 meters. Equipment used predominantly in residential areas are not permitted the increase in field strength.

(3) Induction cooking ranges manufactured prior to February 1, 1980, shall be subject to the radiation limits for general ISM equipment.

Section 18.307 Conduction limits.

Conduction limits shall be applied to ultrasonic equipment and induction cooking ranges as follows:

(a) Ultrasonic equipment:

When measured both grounded and ungrounded, the conducted RF voltage from ultrasonic equipment shall not exceed the following:

Frequency (kHz)	*Conducted RF voltage (microvolts)*
on or below 490 kHz	1000
above 490 kHz	200

Note: Methods of making conducted interference measurements are described in "Electromagnetic Interference Characteristics, Requirements for Equipment", MIL-STD-461A, "Electromagnetic Interference Characteristics, Measurement of", MIL-STD-462, and "Definitions and Systems of Units, Electromagnetic Interference Technology". These documents are available from the Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120.

(b) Induction cooking ranges:

Induction cooking ranges manufactured after February 1, 1980, shall limit the conducted RF voltage fed back into the power lines to the following:

Frequency of emissions (kHz)	*Conducted RF Voltage Limit (millivolts)*
10-100	10-1 (linear interpolation)
100-500	1
500-30,000	0.25

Measurements of conducted RF voltage shall be made using a 5 microhenry 50 ohm LISN (Line Impedance Stabilization Network).

Section 18.309 RF lighting devices.

RF lighting devices, pending further action in General Docket 83-806, shall meet the requirements specified below, as a marketing prerequisite:

(a) RF lighting equipment marketed for use in industrial, commercial, and business environments, shall be subject to the radiation and conduction limits set forth for Class A computing devices under Sections 15.810 and 15.812 of Part 15, Subpart J of this Chapter.

(b) Consumer RF lighting equipment or RF lighting devices marketed for use in residential areas shall be subject to the radiation and conduction limits set forth for Class B computing devices under Sections 15.830 and 15.832 of Part 15, Subpart J of this Chapter.

Section 18.311 Methods of measurements.

(a) ISM equipment measured for compliance with the specifications of this part, unless otherwise specified, shall be tested in accordance with FCC MP-5 "Methods of Measurements for ISM equipment".

(b) RF lighting devices shall be measured for compliance, to the extent possible, in accordance with FCC MP-4 "Methods of Measurements of Radio Noise Emissions from Computing Devices".

Appendix B

METHODS OF MEASUREMENTS FOR INDUSTRIAL, SCIENTIFIC, AND MEDICAL EQUIPMENT

FCC/OST MP-5 (1984)

Preface

This document sets forth uniform methods of measurements of radio noise emitted from ISM equipment, as defined in Section 18.107 of the FCC Rules. The technical specifications for ISM equipment are contained in Part 18 of the FCC Rules. Methods of measurements of radiated, powerline conducted radio noise, frequency and power output (when applicable) are covered herein. Applicants for both notification and certification should employ these methods. Testing of ISM equipment by the FCC will be conducted in accordance with these methods of measurements, to the extent possible. This document has been separated in two parts; Part I deals with the methods of measurements for all types of ISM equipment and Part II, notwithstanding the requirements in Part I, discusses the measurement procedure for microwave ovens.

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PART I - GENERAL PROCEDURE

1.0 DEFINITIONS

The definitions in Parts 2 and 18 of the FCC Rules and the following shall apply to use of this standard.

1.1 *Ambient level*

The magnitude of radiated or conducted signals and noise existing at a specific test location and time.

1.2 *Emission*

Electromagnetic energy produced by a device which is radiated into space or conducted along wires and is capable of being measured.

1.3 *Radio noise*

An electromagnetic noise that may be superimposed upon a wanted signal and is within the radio frequency range. Any unwanted disturbance within the radio frequency band, such as undesired electric waves in any transmission channel or device.

1.4 *Radiated radio noise*

Radio noise radiated into space. Such noise may include both radiation and induction components of the field.

1.5 *Conducted radio noise*

Radio noise propagated from the device back into the public electrical power network via the supply cord.

1.6 *Equipment under test (EUT)*

A representative piece of ISM equipment being tested or evaluated.

1.7 *Ground plane*

A conducting surface used to provide uniform reflection of an impinging electromagnetic wave. Also, the common reference point for electrical potentials.

2.0 *GENERAL TEST CONDITIONS*

2.1 *Test sites*

An environment which assures valid, repeatable results shall be used. A measurement is valid to the extent that it is a true representation of the characteristic being measured, and when the same measurement of the characteristics procedure yields repeatable results. Measurements should be made on an open field, however, alternatives are permitted (See 2.1.2 and 2.1.3). A description of the test facility used for equipment subject to certification or when required by the Commission, shall be filed, pursuant to Section 18.205 of the FCC Rules (47 CFR Section 18.205).

2.1.1 *Open field sites*

Measurements of radiated radio noise should be made in an open, flat area characteristic of cleared, level terrain. For details on how to set up a suitable site, see FCC Bulletin OST 55: *Characteristics of Open Field Test Sites,* available from the FCC Consumers Assistance Office, Washington, D.C. 20554. Measurements made by the Commission will be performed on an open field site.

2.1.2 *Testing at the user's premises, factory, or other facilities*

Testing at the user's premises, factory or other facilities is permitted only for ISM equipment which, due to operating conditions, may not be tested on an open field site.

2.1.3 *Testing in a shielded enclosure*

Radiation measurements made in a shielded enclosure are suitable only for determining the frequency profile of an EUT; they are not suitable for determining the actual levels of the emissions unless it can be shown that the results of tests made in the enclosure are correlatable to those made at an open field site. Conducted radio measurements made in a shielded enclosure are acceptable and, in fact, preferable.

2.2 *Measuring instrumentation*

Radiated and conducted measurements shall be made with a radio noise meter that conforms with the American National Standard Specifications for Electromagnetic Interference and Field Strength Instrumentation 10 kHz to 1 GHz, C63.2 (1980). Alternatively, a spectrum analyzer may be used, provided the results obtained can be accurately reproduced with a suitable radio noise meter and that it is used, when necessary, with appropriate accessories to insure sufficient sensitivity and overload protection. Other instruments may be used for certain restricted and specialized measurements when data so measured are correlatable to that achieved with C63.2 instrumentation.

Note: Accessories needed would depend upon the measurement situation and could include preamplifiers for sensitivity improvement, filters and/or attenuators from overload protection, and additional quasi-peak detection circuitry. Overload is defined as harmonic distortion, intermodulation, or gain compression of spectrum analyzer input signals. Precautions may have to be taken to insure that the spectrum analyzer operates linearly before taking final measurements. Consult user's manual for instructions and guidance. Application notes on the use of spectrum analyzer and other instruments are also available from several manufacturers.

2.2.1 *Calibration of measuring instrumentation*

The calibration of the measuring instrumentation, including any accessories that may affect such calibration, shall be checked frequently enough to assure its accuracy. Adjustment shall be made and correction factors applied in accordance with instructions contained in the manual for the measuring instrument.

2.2.2 *Detector function selection and bandwidth*

For radio noise meters or spectrum analyzers which include weighting circuits, the detector function selector shall be set to average. When correlation can be shown between average and some other detector function for a particular piece of equipment, that detector function may be used.

The 6 dB bandwidth of the measuring instrument shall not be less than:

— 3 kHz for measurements below 450 kHz

— 10 kHz for measurements from 450 kHz to 30 MHz

— 100 kHz for measurements from 30 to 1000 MHz

— 1 MHz for measurements above 1000 MHz

Post detector video filters may be used in the case of peak reading spectrum analyzers if correlation can be shown to an average reading or quasi-peak radio noise meter. Alternatively, field strength meters and spectrum analyzers without weighting circuits may be employed, provided measurements are made on the peak basis and recorded as observed. For pulsed, broadband emissions the measured data shall be corrected for pulse desensitization factor. With this correction applied to peak indications, if the duty cycle is known or can be measured, average values of desensitization correction factor for a given emission, it may be necessary to vary the above specified minimum bandwidth of the measuring instrument.

Notes: 1. The above specified bandwidths have tolerances as prescribed in ANSI standard C63.2 – 1980.

2. If bandwidths greater than those specified in 2.2.2 are used, higher readings may result for EUT's with broadband emanations.

3. Data taken when measuring instrumentation employing logarithmic amplifiers when using the average function will represent the average of the logarithm of the voltage level. If the emanation observed is pulsed, broadband observed values will be materially lower than the true average of voltage. Instrument overload is likely to occur with linear RF systems if the emission pulse duty cycle is less than that for which the measuring instrumentation is rated.

2.2.3 *Units of measurements*

Measurements of radiated emissions shall be reported in terms of microvolts per meter at a specified distance. The indicated readings on the spectrum analyzer or the radio noise meter shall be converted to microvolts per meter by use of appropriate conversion factors. Measurements of conducted emissions shall be reported in terms of microvolts.

2.2.4 *Antennas*

The following antennas shall be used for measuring the field strength:

Frequency range	Type of antenna
below 30 MHz	shielded loop
30 to 1000 MHz	calibrated tuned half-wave dipole or other comparable linearly polarized antenna
above 1 GHz	broadband linearly polarized horn antenna

2.2.5 *Antenna height variation*

The measurement antenna must be varied in height above ground to obtain the maximum signal strength. In the frequency range:

— Below 30 MHz. The antenna height shall be set at around 2 meters and minor variations in height scans shall be made. Care should be taken to assure that nulls are not created.

— 30 to 1000 MHz. For measurement distances up to and including 10 meters, the antenna height shall be varied from 1 to 4 meters. Beyond 10 meters, the height shall be varied from 2 to 6 meters.

— Above 1000 MHz. No specific height but antenna orientation and variations in height shall be such that nulls are not created.

These height scans apply for both horizontal and vertical polarization, except that for vertical polarization the minimum height should be increased so that the lowest point of the bottom end of the dipole (or other antenna), at any frequency, clears the site ground surface by approximately 25 cm.

2.2.6 *Antenna-to-test unit distance*

Measurements shall be made at the distance at which the limits are specified, to the extent possible.

A sufficient number of measurements shall be made in the vicinity of the EUT to enable plotting of the polar radiation pattern and to assure the correct determination of the major lobes. Where conditions permit, these measurements shall be made at intervals of no more than 20 degrees in azimuth directions and at distances not exceeding the one at which the emission limit is specified.

The field strength measurements for the maximum field strength at the distance at which the limit is specified, shall be made along the radial corresponding to the lobe of maximum radiation as determined from the polar radiation pattern. Sufficient measurements shall be made along radials extending through all lobes which are within 15 dB of the apparent maximum lobe. Where possible, field strength measurements shall be made along each radial at several intervals and an average curve shall be drawn for measured field strength in uV/m versus distance in meters. Where necessary, the average curve shall be extended to show the extrapolated field strength at the distance at which the emission limit is specified.

The Commission as an alternative shall accept measurements at a closer fixed distance for equipment subject to certification or notification from the public, provided 1/d is used as an attenuation law factor. Where d is the distance at which the field strength is being measured.

2.3 *Frequency range to be scanned*

Measurements of radiated energy shall be made from the lowest generated frequency to the tenth harmonic or highest generated frequency. For conducted emissions, when required, measurements shall be made from 10 kHz to 30 MHz.

2.4 *Preliminary testing and monitoring*

Preliminary radiated measurements should be made inside, preferably in an enclosure, at a closer distance than specified for compliance to determine the emission characteristics of the EUT. If a spectrum analyzer is not used, radio noise measurements should be monitored using either a headset or loudspeaker as an aid in detecting ambient signals and selecting problem frequencies. Precautions shall be taken to ascertain that the use of a headset or speaker does not affect the radio noise meter indication during testing.

2.5 *Data-reporting format*

The measurement results expressed in accordance with 2.2.3, and specific limits where applicable, shall be presented in tubular and/or graphical forms showing level vs. frequency. Instrumentation, instrument and bandwidth settings, detector function, EUT arrangements, sample calculation with all conversion factors and all other pertinent details shall be included along with the measurement results.

3.0 *RADIATION HAZARD TEST*

For ISM equipment operating on higher frequencies (above 900 MHz), in particular microwave ovens and medical diathermy equipment, radiation leakage should be measured in accordance with the current Bureau of Radiological Health standard, employing an electromagnetic radiation monitor (the FCC laboratory shall use a Narda Model 8100 or equivalent). This test is made primarily to assure that personnel will not be exposed to radiation hazard in testing the equipment. Equipment submitted to the FCC which have radiation leakage apparently in excess of BRH limit will be reported to BRH for their evaluation.

4.0 *FREQUENCY MEASUREMENTS*

For ISM equipment designed to operate on one of the ISM frequencies, the maximum frequency deviation due to the load and normal operating conditions shall be measured and reported. These measurements may be performed indoors. The load effect on frequency variation is determined by finding the extreme values of frequency obtainable by adjustment of applicator spacings, external control settings, and varying loads, for each combination of applicators.

After a five-minute no-load warm-up from a cold start at room temperature (without any applicators connected), determine the maximum deviations from the ISM frequency (both above and below) by making measurements with different combinations of applicators, applicator spacings, control settings, and load.

Using that combination of applicators and load spacing which produces the maximum observable power output into the load, operate the equipment from a cold start at room temperature for a period of six hours (two hours for portable equipment). Measure the frequency at the beginning of the run and at frequent intervals until its completion.

After making the last measurement, once again adjust the controls of the equipment, vary the load, and change the applicator spacing, to find the combination that yields the worst deviation from the ISM frequency.

For medical diathermy equipment the maximum and minimum frequency measured must be within 70% of the frequency tolerance listed in Section 18.301 of the Rules.

5.0 *RADIATED TEST PROCEDURE*

On an approved test site, the EUT shall be placed on a rotatable platform, fed with power and control circuits via underground cable. The turntable on which the EUT is to be mounted shall be substantially non-metallic and 50 cm above ground level. If the equipment is designed to be operated on a table, a wooden support shall be placed on the platform such that the EUT sits on a surface 1 meter above ground, with the applicator leads (if any) fully extended in front of the equipment. If for practical reasons, it is not feasible to use a rotatable platform, the EUT may be located in a fixed position, with the measurement installation moved around the equipment to locate and measure the maximum level of radiation.

When the EUT is fitted with a special grounding terminal, this shall be connected to earth ground by a lead as short as possible. When no grounding terminal is provided, the EUT shall be tested as normally connected; that is, any grounding is obtained through the mains supply. When the EUT is supplied with a flexible power cable, as much of this as possible shall be on the ground.

For the fundamental frequency and all other frequencies having significant strength, that is within 20 dB of the limits, measurements shall be made with and without a load, rotating the platform to determine the orientation giving the maximum observable value. This must be done for both horizontal and vertical polarization of the receiving antenna. All recorded levels within 20 dB of the limits specified shall be reported.

For radiation measurements for medical diathermy equipment operating above 900 MHz, the procedures in Part II shall be followed.

PART II - MICROWAVE OVENS

Microwave ovens shall be type approved by the Commission. Testing at the FCC laboratory shall be done in accordance with the following methods, notwithstanding the applicable sections in Part I of this document.

6.0 *LOAD*

For all measurements the energy developed by the oven is absorbed by a dummy load consisting of a quantity of tap water in a beaker. The "Nalgene" Cat. No. 1201-1000 polypropylene beaker or any other beaker of similar dimensions or other low-loss material shall be used as the container. If the oven is provided with a shelf or other utensil support, test shall be made with this initial normal position. For ovens rated at 1000 watts or less power output, the beaker shall contain quantities of water as listed in the following subparagraphs. For ovens rated at more than 1000 watts output, each quantity shall be increased by 50% for each 500 watts or fraction thereof in excess of 1000 watts. Additional beakers are used if necessary.

6.1 *Load for power output measurement*

This load consists of 1000 milliliters of water in the beaker, located in the center of the oven.

6.2 *Load for frequency measurement*

This load consists of 1000 milliliters of water in the beaker, located in the center of the oven.

6.3 *Load for measurement of radiation on second and third harmonic*

Two loads, one of 700 and the other of 300 milliliters, of water are used. Each load is tested both with the beaker located in the center of the oven and with it in the right front corner.

6.4 *Load for all other measurements*

This load consist of 700 milliliters of water, with the beaker located in the center of the oven.

7.0 *POWER OUTPUT MEASUREMENT*

The power output is measured by the calorimetric method, using the load specified in Section 6.1, computing the power output from the observed temperature rise of the load over a period of time. The measured value of power output is used to determine the allowable out-of-band field strength under the terms specified in Section 18.305 of the Rules. The ac power input to the oven is also measured to determine if the oven is operating in accordance with the manufacturer's specifications.

8.0 *FREQUENCY MEASUREMENTS*

The maximum and minimum frequency measured must be within 70% of the frequency tolerance listed in Section 18.301 of the Rules.

For pulsed ovens, frequency measurements are made by beating a transfer oscillator against the fundamental emission of the oven and measuring the frequency of the oscillator with a suitable frequency counter. Ordinary frequency counters cannot be used to measure the oven frequency directly in a pulsed oven. Continuous-wave ovens are measured either by the transfer oscillator method or by direct measurement with a frequency counter. Measurements are made of:

(a) The variation of frequency with time, using the load specified in Section 6.2, starting with the oven and load at room temperature and continuing until the load quantity has been reduced by evaporation to approximately 20% of the original quantity. This test is made with nominal rated ac supply voltage.

(b) The variation of frequency for line voltage variation from 80% to 125% of nominal rated voltage, starting with the oven warm from at least 10 minutes use, with a load as specified in Section 6.2, and with this load at room temperature at the beginning of the test.

9.0 *MEASUREMENT OF RADIATED EMISSIONS*

Initial measurements are made near the oven with the measuring antenna 3 meters from the nearest part of the oven. The dummy load specified in Section 6.3 or 6.4 is used, as applicable. The oven is rotated about its vertical axis on the turntable, and the polarization and height of the receiving antenna are varied to obtain the highest field strength on the particular frequency under observation. Measurements at the 3 meter distance are made in a large room or outdoors; with the equipment and antenna located so as to minimize effects due to reflections from the building structure or other items in the field. For measurements above

1GHz and at 3 meters, an antenna of small aperture (i.e., a small horn, without its reflector) is used, because the field over the area of a large antenna would be non-uniform, and such an antenna would not have the gain normally expected.

At each test frequency, the reading of the field strength meter is observed during the heating cycle as the following factors are varied:

(a) oven orientation

(b) antenna orientation

(c) antenna polarization

(d) at the second and third harmonics only, the two load sizes and load locations specified in Section 6.3

(e) for ovens employing mode stirrers, the test should include several cycles of stirrer rotation

At the second and third harmonics, the recorded data should include the highest reading observed for each load size and load location. At other frequencies, the highest reading observed should be recorded.

When measuring sidebands close to the fundamental (near the edges of the ISM band frequency limits) great care must be taken to avoid errors caused by overload from the emission at the fundamental frequency. A tunable filter can be usefully employed to reduce the level of the fundamental relative to that of the particular sideband if overload occurs. Overload can be detected by observing the relative change in indicated signal level for different values of input attenuator, either internal or external to the field intensity meter.

Since most microwave field strength meters have relatively little rejection at the image frequency, care should be taken to assure that apparent spurious emissions in the vicinity of the image frequency are really present. A tunable filter or band-pass filter can be used to attenuate the fundamental frequency as for the sidebands.

9.1 *Computations to determine compliance*

The measured field strength at 3 meters is converted to the field at 300 meters using the formula:

$$E_{300\ m} = K \times E_{3\ m}$$

where K is given by:

Frequency	*K*
1830 MHz	.0046
2745 MHz	.0070
3660 MHz	.0090
4575 MHz and above	.0100

For frequencies between those given in the table, the value of K is determined by linear interpolation.

The values of K given above were determined from measurements at the FCC laboratory test site. Over level terrain and limiting the height of the measuring antenna to 4 meters (12 feet), the measured values of K given above show good agreement with theory.

In the absence of actual measured values of attenuation at another site, the field may be extrapolated to 300 meters using inverse linear variation of field with distance to give conservative results.

While it is very unusual for microwave ovens to have strong radiated fields below 1 GHz, if the field strength values observed at 3 meters are strong enough to warrant concern over their values as extrapolated to 300 meters, it is suggested that additional measurements be

made outdoors on an unobstructed level site at 30 meters or greater distance. This would eliminate any questions as to reflections from nearby objects or antenna aperture effects which might occur at these frequencies in measurements at 3 meters.

Political Broadcast, Public Inspection File
Political Broadcast, Seven-Day Rule

Complaint filed against television station KCPQ, Tacoma, Washington regarding the airing of a motion picture featuring presidential candidate Ronald Reagan. Complainant failed to make an "equal opportunities" request within one week from the airing of the picture. —*Ron Culpepper*

FCC 84-520

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In re Complaint of
Ron Culpepper
against
Television Station KCPQ
Tacoma, Washington

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 1984; Released: November 5, 1984

BY THE COMMISSION:

1. The Commission has before it a complaint,[1] filed October 19, 1984, by Mr. Ron Culpepper on behalf of presidential candidate Walter Mondale, concerning the political broadcasting practices of television station KCPQ, Tacoma, Washington.

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[1] On October 24, 1984, Mr. Culpepper discussed this matter with the staff of the Fairness/Political Programming Branch. At that time, he was given guidance including information about the seven-day rule (47 C.F.R. 73.1940(e)) and was informed that a staff ruling would be forthcoming. Nevertheless, prior to the issuance of the staff ruling, an Application for Review was filed on October 29, 1984. Since the staff took no official action on which to base an appeal, we find the Application for Review to be premature. See Section 1.115 of the Commission's rules. Therefore, we are treating the Application for Review as a supplemental pleading to the complaint. However, because of the short amount of time remaining between now and the November 6, 1984, election, we feel that it is appropriate for the Commission, rather than the Mass Media Bureau, to issue a ruling in this matter.

2. Mr. Culpepper alleges that on September 6, 1984, KCPQ aired a motion picture entitled "Storm Warning," which featured President Reagan. As the co-chairman for the Pierce County Mondale/Ferraro campaign, Mr. Culpepper requested "equal opportunities" on behalf Mr. Walter Mondale. Mr. Culpepper further states that the licensee denied this request because (1) it was of the opinion that the motion picture did not constitute a "use"; and (2) the request did not comply with the Commission's seven-day rule.

3. Mr. Culpepper asserts that any nonexempt appearance by a legally qualified candidate is subject to "equal opportunities." Mr. Culpepper also alleges that his request, which was made October 9, 1984, was timely because the licensee did not list this broadcast in its political file until October 11, 1984. As a result, Mr. Culpepper requests that KCPQ be directed to comply with the "equal opportunities" provision of Section 315 of the Communications Act of 1934, as amended.

Discussion

4. Under the "seven-day" rule, a legally qualified candidate has one week from the airing of his opponent's "use" to submit to the licensee a request for "equal opportunities." Mr. Culpepper acknowledges that his organization failed to make a timely request, and therefore, we find that Mr. Mondale is not entitled to "equal opportunities" with respect to KCPQ's airing of "Storm Warning."

5. Mr. Culpepper claims that the "seven-day" rule should not commence until there has been a proper entry of a "use" in the station's political file. Therefore, he asserts his request was timely because KCPQ took more than a month to enter "Storm Warning" in its file. Under the facts before us, the entry in the political file is not relevant to our decision. The candidate did not demonstrate that he (or someone associated with the campaign) examined the station's political file within one week from the airing of the particular "use." Therefore, we find no relationship between the absence of the information in the file and his failure to make a timely request for equal opportunities.

6. It appears from the evidence before us that KCPQ did not make a timely entry of "Storm Warning" in its political file because it was of the opinion that the appearance of President Reagan in this motion picture did not constitute a "use."[2] The licensee's interpretation of what constitutes a "use" is clearly incorrect. It is well established that such appearances are subject to "equal opportunities." *Adrian Weiss*, 58 FCC 2d 342 (B/c Bur. 1976); *Pat Paulsen*, 33 FCC 2d 297 (B/c Bur. 1972), *review denied*, 33 FCC 2d 835 (1972), *aff'd sub nom. Paulsen v. FCC*, 491 F.2d 887 (9th Cir.

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[2] In this connection, Mr. Culpepper has submitted an October 11, 1984, memo from the station.

1974). Furthermore a licensee is required to list in its political file, *as soon as possible,* all requests for broadcast time made by or on behalf of candidates. Section 73.1940(d); See *Michael H. Farley,* ___FCC 2d ___ (Mimeo No. 6065, released August 20, 1984). This file must also reflect the provision of free time to candidates, which would include the airing of a movie featuring a candidate. Under these circumstances KCPQ should have made a timely entry of "Storm Warning" in its political file. The Commission expects that *all* future "uses" to be aired on this station will be properly reflected in its political file.

7. In view of the foregoing, the above-captioned complaint is DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Female Ownership-Participation
FM Station, Authorization
Minority Ownership, Factor in Comparative Proceeding
Transmission, First Local

Review Board affirmed *ID's* FM construction permit grant. Winner's 100% integrated minority ownership enhancement (plus slight credits for past broadcast experience and proposed future local residence) overcame second-place applicant's 100% integrated female ownership (plus slight comparative coverage preference); neither held any significant media interests.

—*Santee Cooper B/cing Co.*

MM Docket No. 83-158

FCC 84R-87

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Santee Cooper Broadcasting Company of Hilton Head, Inc. Hilton Head Island, South Carolina	MM Docket No. 83-158 File No. BPH-810722AA
Women's Broadcasting Coalition, Inc. Hilton Head Island, South Carolina	MM Docket No. 83-161 File No. BPH-820128AT
Heritage Broadcasting Corporation Hilton Head Island, South Carolina	MM Docket No. 83-162 File No. BPH-820129AJ
Jesse N. Williams, Jr. Hilton Head Island, South Carolina	MM Docket No. 83-164 File No. BPH-820129AR

Plantation Broadcasting Corporation Bluffton, South Carolina	MM Docket No. 83-167 File No. BPH-820129AW
Reginald Taylor and G. Troy Mattox d/b/a Calibogue Sound Hilton Head Island, South Carolina	MM Docket No. 83-173 File No. BPH-820129BT
For Construction Permit for a New FM Station	

Appearances

Susan Wing, *William S. Reyner, Jr.*, and *Katherine A. Schoff*, on behalf of Women's Broadcasting Coalition, Inc.; *Richard F. Swift*, *John L. Tierney*, and *Barbara R. Feeherry*, on behalf of Heritage Broadcasting Corporation; *Jerrold D. Miller*, on behalf of Jesse N. Williams, Jr.; *Harrell Powell, Jr.* and *Gary S. Smithwick*, on behalf of Plantation Broadcasting Corporation; and *Ann C. Farhat*, on behalf of Reginald Taylor and G. Troy Mattox d/b/a Calibogue Sound.

DECISION

Adopted: November 27, 1984; Released: December 7, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN[1]), JACOBS, BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. What began as a process involving eighteen applicants has now winnowed down to a choice amongst five (5) remaining contenders: Women's Broadcasting Coalition, Inc. (WBC), Heritage Broadcasting Corporation (Heritage), Jesse N. Williams, Jr. (Williams), and Calibogue Sound (Calibogue) who propose a new FM broadcast station to operate on Channel 288 at Hilton Head Island, South Carolina; and Plantation Broadcasting Corporation (Plantation) which seeks a new station at nearby Bluffton.[2] By *Hearing Designation Order*, 48 Fed. Reg. 10918, published March 15, 1983, these applications were designated for consoli-

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[1] The Board Chairman was absent from oral argument, but has read the transcript thereof and here participates in the Board's decision. *See* Section 0.361(c) of the Commission's Rules, 47 CFR §0.361(c).

[2] A sixth applicant whose name appears in the caption — Santee Cooper Broadcasting Company of Hilton Head, Inc. (File No. BPH-810722AA) — and whose application was denied in the *Initial Decision* — has not filed exceptions in this proceeding. Accordingly, its application will be dismissed. *See* Section 1.276(f) of the Commission's Rules, 47 CFR

dated hearing to determine which proposal would best provide a fair, efficient, and equitable distribution of radio service pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), and on a contingent comparative issue. By *Initial Decision* (*I.D.*), FCC 84D-38, released May 31, 1984, presiding Administrative Law Judge Joseph Stirmer (ALJ) awarded the four Hilton Head Island applicants a decisive Section 307(b) preference over Plantation, the Bluffton applicant, and granted Williams' application after concluding that, of the three applicants proposing total fulltime ownership integration (Williams, WBC, Heritage), Williams was preferred, in the main, because he possessed no other media interests.

2. The proceeding is now before the Review Board on exceptions filed by the four applicants who lost below. The Board has reviewed the *I.D.* in light of the exceptions and reply briefs, the oral argument held September 14, 1984,[3] and the underlying record. We adopt the findings of fact and conclusions of law in the *I.D.*, with the significant modifications contained herein, and affirm the ultimate conclusion that a grant of Williams' application is consistent with applicable Commission policies and precedent.

Section 307(b) Issue: Plantation Application

3. All of the remaining applicants, *pace* Plantation, specified Hilton Head as their city of license; Plantation specified the nearby community of Bluffton,[4] and, accordingly,[5] an issue was designated under 47 U.S.C §307(b) to determine which of the two communities — if either — was more entitled to the facility. *I.D.*, para 1.[6] Because Hilton Head is the city of license of two operating radio stations[7] while Bluffton has none, *I.D.*, para 10, Plantation urged its entitlement to a §307(b) preference. *I.D.*,

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§1.276(f); *see also WFSP, Inc.*, FCC 84R-64, released September 18, 1984 (Rev. Bd.), at n.1.

[3] By letter dated August 15, 1984, Calibogue advised the Board that it would not participate in the oral argument, but would rely entirely on its written exceptions.

[4] As noted, there were originally 18 applications, 15 for Hilton Head, 3 for Bluffton. Plantation Exceptions at 1 n.1.

[5] Perhaps not so "accordingly." *Compare Pillar of Fire*, 90 FCC 2d 1021, 1022 & n.1 (1982), and also see brief discussion *infra* para. 9 & note 39.

[6] As a broad principle, once the Commission finds that one community is more entitled than any competing community/communities because a grant to it would best " . . . provide a fair, efficient, and equitable distribution of radio service," 47 U.S.C. §307(b), the applicant for the clearly preferred *community* is the winner, despite any other comparative distinctions *as between the applicants. See FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955). For a very recent application of the *Allentown* doctrine, *see Alessandro Broadcasting Co.*, FCC 84R-71, released October 11, 1984 (Rev. Bd.) (Orange, California applicant wins under §307(b) over applicants for other communities).

[7] WHHR-AM and WHHQ-FM, *I.D.*, para. 9.

para. 121. However, taking official notice of the fact that the Commission — after designation of the instant hearing — had assigned a new FM channel to Bluffton,[8] the ALJ ruled: (1) that the community of Hilton Head was entitled to a decisive §307(b) preference, *I.D.*, para. 127; and (2) that, per the *Allentown* doctrine (*see supra* note 6),[9] the Plantation applicant was entitled to no further comparative consideration. *I.D.*, para. 127. Both rulings appear to us to be erroneous, and we reverse.

4. The ALJ's predicate for awarding a dispositive §307(b) preference to the Hilton Head applicants — *i.e.*, that the far larger community of Hilton Head was entitled to its second FM station and "second independent broadcast voice," *I.D.*, para. 126 (the Hilton Head AM and FM are co-owned), before Bluffton received its "second local FM station," *id.*, at para. 127 — is flawed by the attribution of a (fictional) FM station to Bluffton. While the Commission has, indeed, recently assigned an FM channel to the town of Bluffton, the ALJ cites no case, nor are we aware of any, for the proposition that a channel assignment, standing alone, or even an ongoing hearing in pursuit of a permit for that channel, is cognizable as an existing broadcast service for §307(b) or other comparative purposes.[10] In fact, albeit in a situation not quite analogous, the Board recently held that, for comparative purposes, it would consider the effect only of "granted construction permits for new stations." *See Daytona Broadcasting Co., Inc.*, 55 RR 2d 1326, 1336 & n.29 (Rev. Bd. 1984)(applications for review pending); *cf. Affinity Communications, Inc.*, 56 RR 2d 510, 512 (Rev. Bd. 1984). Whereas the question in *Daytona Broadcasting* was at what stage to consider *potential* new stations for "comparative coverage" analyses, we see no convincing reason why (or how) our rationale could (or should) differ here. The inquiry in both cases is the same: at what point should a *potential* station be recognized as having an impact for immediate comparative purposes? Based upon the avowal of the Media Bureau, the Board in *Daytona Broadcasting* accepted the proposition that the agency has traditionally "granted

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[8] *See I.D.*, paras. 10, 121-123 (*citing Report & Order)*, Mimeo 6736, released September 27, 1983 (assigning Channel 296A to Bluffton). Plantation reports:

> Ironically, the Commission cited the protracted litigation in the Hilton Head proceeding as an important reason for assigning the channel to Bluffton.

Plantation Exceptions at 4.

[9] Actually, the ALJ cited *WHW Enterprises, Inc.*, 89 FCC 2d 799 (Rev. Bd. 1982), *review denied*, FCC 83-368, released September 15, 1983 (Comm'n), *appeals pending sub nom. WHW Enterprises, Inc.* v. *FCC*, Nos. 83-2067 *et al.* (D.C. Cir.). *See I.D.*, para. 127. However, *WHW* was derivative, not novel, *see* 89 FCC 2d at 808-812 & n.5.

[10] Of course, the lack of case guidance on this point is not the fault of the ALJ, who merely imposed his logic on, apparently, unexplored territory. *See* Plantation Exceptions at 7 ("this becomes a case of first impression").

construction permits" for comparative purposes.[11] Although the cognition line, theoretically, could be drawn anywhere from channel assignments, through applications filed, through applications "accepted for filing," through applications in hearing, through "granted construction permits," through program test authority, through grant of license, or even through stations "on the air," we think as we did in *Daytona Broadcasting* that drawing the cognition line at "granted construction permits" is both realistic and reasonable. Drawing the line at mere channel assignment would appear premature; the Commission's assignment tables contain numerous communities whose channel assignments lie fallow, unloved and unclaimed.[12] Moreover, the filing of an application, or even competing applications, does not necessarily assure the expeditious advent of a station. *See, e.g., California Broadcasting Corp.*, FCC 84R-60, released August 30, 1984 (Rev. BD.)(one applicant disqualified by ALJ; remaining applicant subject of remand on basic qualifications); *see also Coastal Bend Family Television, Inc.*, FCC 83R-59, released August 26, 1983 (Rev. Bd.)(second applicant, who subsequently dropped out, queried on finances and candor after sole competing applicant disqualified for identical reasons).[13] And, while we recently commented that even the grant of a construction permit does not guarantee the eventuation of a station,[14] our institutional experience teaches that construction permittees do build more than 95% of the time, particularly radio permittees. Hence, we will consistently apply the *Daytona Broadcasting* premise that, for comparative purposes, only "granted construction permits" will be reckoned when calculating "alternative services," and must, therefore, disagree with the ALJ's conclusion that Bluffton is to be regarded as already having an FM station; it currently has neither a station nor a permittee.[15]

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[11] *See* 55 RR 2d at 1338 & n.35. *But cf. Cedar Rapids Television Co.* v. *FCC*, 387 F.2d 228 (D.C. Cir. 1967) (granted construction permits not recognized for purposes of CATV rules; only "actual operating facilities").

[12] For example, the Board recently heard oral argument in a Taft, California FM proceeding in which counsel advised that the channel there under competitive siege had been assigned "in the original allocations in 1963 of FM channels" and "ha[d] been around . . . almost 20 years at the time it was applied for . . . ." *See* Tr. of Oral Arg. in B/c Docket Nos. 80-379, 80-380 (October 30, 1984), at 2332.

[13] The ALJ presiding in this case buttressed his attribution of an FM station to Bluffton by noting that, not only must applicants applying for the recently assigned Channel 296A specify the town of Bluffton *and no other* in the wake of the abrogation of the "10-mile" rule (about which more *infra* para. 8), *I.D.*, para. 122 & n.12, he further observed that "two separate groups have pledged to apply for and build a station in Bluffton." *Id.*, at para. 122. We acknowledge, of course, that the exclusive channel assignment and the building pledges do increase the likelihood of an eventual Bluffton FM station. Yet, we harken also to the Aristotelean caveat (*Nicomachean Ethics*, bk. 1, ch. 7) that "one swallow does not a summer make." Nor two.

[14] *See Washington's Christian Television Outreach, Inc.*, FCC 84R-70, released October 9, 1984 (Rev. Bd.) at n.37, where we noticed the Commission's September 14, 1984 revocation of two construction permits for protracted failure to build.

5. In view thereof, we must find that the dispositive §307(b) preference awarded to Hilton Head and the concomitant comparative disqualification of Plantation (Bluffton) from any further consideration was, consequently, inappropriate.[16] Based on our view of the law, Plantation was entitled to both §307(b) consideration for its Bluffton proposal and — as will be seen *infra* — conventional comparative consideration in the event that no dispositive §307(b) preference is due any applicant herein.

6. In that vein, despite the fact that no radio station is currently licensed to the hamlet of Bluffton, we also reject Plantation's oppositive plea that *it* is entitled to a dispositive §307(b) preference for its Bluffton proposal. It is true, as we just expressed in *Ruarch Associates*, FCC 84R-73, released October 18, 1984 (Rev. Bd.), that the sinews of §307(b) law hold that "[e]very community of 'appreciable size' . . . is *presumed* by the Commission to need at least one radio station for local self-expression." *Id.*, at para. 2 (citation omitted; emphasis added). And, where "a transmission service disparity already exists, a different *presumption* applies, namely that the community which has no transmission service has a greater need than the community that already has one (or more)." *Id.*, at para. 5 (emphasis added). As explained more fully in *Ruarch*, however, the case law then teaches that both of the foregoing §307(b) "presumptions" may be rebutted. Thus, we found in *Ruarch* that the town of Edinburg, Virginia — with no licensed transmission service — was entitled to no dispositive §307(b) preference over the competing community of Woodstock, Virginia, notwithstanding the fact that the latter community already

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[15] In fairness to the ALJ, the instant *I.D.* was issued only one month after we released *Daytona Broadcasting*, a case not nearly on all fours, and the subject issue was quite minor in that case. Interestingly, and consistent with *Daytona Broadcasting*, the ALJ noted (*I.D.*, n.3):

> The recently granted FM station in Port Royal, South Carolina (BPH-800519AF) will cover 100% of the 1.0 mV/m service area of all applicants and thus will add one more aural service to each column.

See Beaufort County Broadcasting Co., 94 FCC 2d 572 (Rev. Bd. 1983) (awarding a dispositive §307(b) preference to Port Royal, S.C. over Beaufort, S.C.), *review denied*, FCC 84-284, released June 19, 1984 (Comm'n), *appeal pending sub nom. Beaufort County Broadcasting, Inc.* v. *FCC*, No. 84-1265 (D.C. Cir.).

[16] It appears that, in recognition of the consequences of charging Bluffton with a fictional FM station for §307(b) purposes, the ALJ at the outset of the hearing urged the Bluffton applicants "to reassess their position in this proceeding," and the two other Bluffton applicants dropped out. *I.D.*, at para. 123. We know not precisely what the ALJ was suggesting to the Bluffton applicants, for it would seem too late for them to have then changed their applied-for city of license. *See Beaufort County, supra* note 15.

possessed a fulltime AM facility.[17] We there observed, *inter alia*, that, although Edinburg (population — 752) was a "separate community," "we [had] not been directed to a single case in which a community with a population of less than 1000 has received a dispositive Section 307(b) preference . . . ." *Id.*, at para. 6. Noting other factors as well,[18] and relying, in part, on *Charles Vanda*, 4 FCC 2d 655 (Rev. Bd. 1966), *review denied*, FCC 66-1013, released November 16, 1966 (Comm'n), we found insufficient §307(b) distinctions between the two Virginia communities, and we went on to make a choice between the two applicants under the standard comparative issue. *Ruarch*, para. 6.[19]

7. Considering *Ruarch*, our Bluffton/Hilton Head model suggests an *a fortiori* case. For the record here shows, for example, that while Hilton Head is a burgeoning community of 11,000(+) inhabitants,[20] has 950 businesses employing 12,000 workers,[21] and "is the business, commercial and tourism center of the surrounding area, including Bluffton,"[22] Bluffton is comprised of only "426.1 acres, or less than one square mile,"[23] has only 235 housing units,[24] "has no tourist accommodations and only one restaurant,"[25] and —in total — boasts "approximately 20 commercial establishments employing . . . 68 to 86 people, most of whom are not Bluffton residents."[26] On the other hand, because the Commission has recently assigned an FM frequency directly to Bluffton, we hesitate to conclude that that community is not of the "appreciable size"[27] requisite to having shown some need for a local transmission outlet.[28]

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[17] *Cf. FM Channel Assignments*, 51 RR 2d 25, 29 (1983) ("favoring a second assignment to a large, dynamic community over a first assignment to a very small community is not inconsistent with the Commission's mandate to assign frequencies in a fair and efficient manner.").

[18] For example, we found in *Ruarch* that Edinburg and Woodstock were five miles apart, that both applicants proposed to cover the same geographic areas and population, that the larger community of Woodstock (population - 2,627) was the local "center of commerce and industry," and that the Edinburg applicant had not shown that it had a greater need for a first *transmission* service than Woodstock's need for a first *competitive* service (which competitive service would concurrently cover the same area and population as the proposed Edinburg station).

[19] Again, in certain fairness to the ALJ, the instant *I.D.* preceded our decision in *Ruarch*.

[20] *I.D.*, para. 11.

[21] *Id.*, para. 13.

[22] *Id.*, para. 11.

[23] *Id.*, para. 23.

[24] *Id.*, para. 25.

[25] *Id.*, para. 24.

[26] *Id.*, para. 25. For a more complete, but nonetheless rather short, listing of the salient characteristics of Bluffton, *see I.D.*, paras. 23-28.

[27] *See generally Plainview Radio*, 24 FCC 405, 421 (1958).

[28] We have indicated, however, in a slightly different context, that rulemaking statements made in consideration of an assignment of a channel to a particular community are not

But, as we iterated in *Ruarch*: "Historically, it is not without precedent for the presumption of need [of a community without a local transmission facility] to be rebutted by a larger community with an existing local transmission service against a smaller community lacking such service." *Id.*, at para. 5 (*citing Cherokee Broadcasting Co.*, 17 FCC 2d 121 (1969).

8. As we have noted, while the FM channel here at contest is assigned to Hilton Head, Plantation (and others) were not precluded, at that time, from applying for any community within a 10-mile radius of Hilton Head by virtue of former Section 73.203(b) of our rules, 47 CFR §73.203(b) (1982)(herein "10-mile" rule). In recently eliminating the "10-mile" rule, and in requiring the §307(b) comparative choice of community to be made at the rulemaking stage in the future, the Commission simultaneously eliminated the collateral policies that had evolved to test whether an applicant for a smaller community intended to serve a larger community nearby, but nevertheless specified the smaller community solely to garner an artificial §307(b) preference. *See Suburban Community Policy*, 93 FCC 2d 436 (1983). Many commenting in that policy proceeding warned that elimination of the collateral "testing" policies would result in "construction permit applications specifying, as the community of license, a small community that is nearby a larger or metropolitan community the applicant actually intends to serve," 93 FCC 2d at 441, and that "the Commission 'will be plagued with questions of good faith [and] undisclosed motivation for service to the larger more lucrative market,' as long as an advantage can be earned under §307(b)." *Id.* Be that as it may,[29] and

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necessarily to be construed as "words of limitation" or — more generally speaking — a conclusive determination of questions arising under §307(b). *See, e.g., Campbell and Sheftall*, 7 FCC 2d 658, 667 (Rev. Bd. 1967) ("Section 307(b) determination is a separate, subsequent determination unrelated to the rulemaking" assigning a channel to a particular community); *see also Beaufort County, supra* note 15; *WHW Enterprises, supra* note 9. The aforestated principle here runs to Plantation's favor, since the instant channel at contest is assigned by rule to Hilton Head, not Bluffton.

[29] And it may not be, because the Commission (in FM and TV cases) will now — with §307(b) remaining as the touchstone — decide the specific community of license in a pre-comparative stage, thus eliminating, at a minimum, the incipient mischief of the "10-mile" rule. *See Suburban Community Policy*, 93 FCC 2d at 451-453. As we sighed not long ago: "To the great relief of all concerned, cases such as this . . . (and associated §307(b) maneuverings) are a dying breed, at least with respect to FM radio and television applications." *Public Service Broadcasting of West Jordan, Inc.*, 55 RR 2d 1633, 1636 n.9. However, cases such as the one at bar and *Beaufort County, supra*, were caught in the cusp of this policy change. That is, applicants applying before the policy change could specify a community within the nearby radius of a larger community to which the channel was assigned; but, by virtue of the fact that *Suburban Community Policy* was given immediate effect with respect to the "testing" policies, *see* 93 FCC 2d at 457, opponents cannot challenge the *bona fides* of applicants (such as Plantation) for the smaller community.

although Bluffton is now but a mote in the Hilton Head maelstrom,[30] we cannot and, therefore, do not challenge the indicated intent of Plantation to maintain predominant fidelity to Bluffton rather than to its newly vibrant neighbor. *Suburban Community Policy*, 93 FCC 2d at 457.[31]

9. Summing it up thus far, we have found: (1) that Bluffton is of a sufficiently "appreciable size," at least, to warrant a local transmission outlet[32]; (2) that no such transmission outlet currently can be charged to Bluffton; and (3) that Plantation's intent to serve Bluffton as its city of license cannot be tested or challenged. The Commission's general priorities when making a §307(b) choice are:

> (1) First full-time aural service.
>
> (2) Second full-time aural service.
>
> (3) First local service.
>
> (4) Other public interest matters.
>
> [Co-equal weight would be given to priorities (2) and (3)]

Alessandro Broadcasting, supra, at para. 7 (*citing FM Channel Policies/Procedures*, 90 FCC 2d 88, 90-93 (1982), *recon. denied*, 56 RR 2d 448 (1984)). The first two priorities are inapposite here; all areas and populations to be covered by the instant applicants now receive first and second full-time aural service.[33] Though the ALJ also found that none of the applicants qualified under priority three ("first local [transmission] service"), we have reversed that conclusion. Hence, as recited in *Ruarch*, the community without "first local [transmission] service" is the *presumptive* §307(b) winner, and — most often — the actual winner as well. *See, e.g., Alessandro Broadcasting, supra; Beaufort County, supra.*[34] But, we have hereinabove rejected Plantation's own demand for a §307(b) preference, finding Bluffton to have less merit to such a dispositive preference than the tiny community without local transmission service in *Ruarch*. Thus, while Hilton Head technically has two local transmission services licensed to it, the AM and FM stations are co-owned and, therefore, represent only one real broadcast "voice."[35] Accordingly, as in *Ruarch*, and based on the same general rationale set forth in paras. 2-7 thereof, we cannot conclude that Bluffton's *presumptive* need for a first local transmission service dispositively outweighs the much larger community of Hilton Head's need of a first *competitive* broadcast "voice."[36] Again, as in *Ruarch*, we find that neither community here is entitled to a §307(b) preference, and that conclusion is fortified by the following facts: (1) Plantation's signal would cover, at least, the same areas and populations as the signals of the Hilton Head applicants[37]; (2) the political boundaries herein reflect no *de facto* social, cultural or economic boundaries,[38] and the juxtaposition of the communities indicates that the respective problems, needs and interests of both communities can be met by a station formally located in either community, *cf. Pillar of Fire*, 90 FCC 2d 1021 (1982)[39]; and (3) the Commission's FM channel assignment priorities as set forth in *FM Channel Policies/Procedures*, and listed above, "*... were not intended to be applied in a rigid and mechanical fashion.*" *FM Channel Assignments, supra* note 17, 51 RR 2d at 29 (emphasis added); *see also Plainview Radio, supra* note 27, 24 FCC at 421 (assignment priorities "not intended to be a mathematically definite regulation to be applied to every proceeding irrespective of other relevant factors"). In light of the foregoing, no §307(b) preference is warranted, and we will reinstate Plantation as for our review of the standard comparative issue.[40]

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[30] Hilton Head's 1980 population was approximately 11,000, but projected to reach about 15,000 by 1985. *I.D.*, para. 11. Bluffton, by contrast, had a population of 480 in 1920, and 541 in 1980. *Id.*, para. 23.

[31] Plantation's opponents do not here challenge its *bona fides* either, for two obvious reasons: (1) the ALJ completely eliminated Plantation under §307(b), and the Hilton Head applicants certainly do not except to that action so far as it goes; and (2) by virtue of *Suburban Community Policy* (immediately eliminating tests of "intent"), no legal basis for challenge now exists. *See Beaufort County, supra.* Those more cynical would undoubtedly make much of the disparity between Bluffton and Hilton Head, couple it to the fact that Plantation is wholly-owned by the wife of the prominent Winston-Salem attorney prosecuting its application, *I.D.*, para. 106, notice the wife's pledge to move to Bluffton (a community alien to her) to manage the station, apparently *sine coniunx* (the husband also being 30% owner of a Greensboro, North Carolina TV permit), and infer a bluff.

[32] *But see Ruarch*, para. 6.

[33] More fully, the ALJ found:

> None of the applicants will provide service to 'white' or 'gray' areas. Indeed, when the new station licensed to Port Royal is taken into consideration, all population proposed to be served will receive at least five aural services both day and night. Thus, there is no basis for awarding a preference to any applicant because of service to 'white' or 'gray' areas, the first two priorities listed by the Commission in its *Revision of FM Assignment Policies and Procedures*, cited *supra*.

I.D., para. 120 (footnote reference to *Beaufort County* omitted).

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[34] *See generally Pasadena Broadcasting Co.* v. *FCC*, 555 F.2d 1046 (D.C. Cir. 1977).

[35] We here agree with that particular aspect of the *I.D.*, para. 126.

[36] The ALJ is correct that proposed provision of *competitive* local transmission service has been considered positively in §307(b) determinations. *See I.D.*, n.14, and cases cited therein.

[37] *See I.D.*, para. 5.

[38] For example, "[m]ost residents of Bluffton work on Hilton Head Island," *I.D.*, para. 25; Bluffton residents shop heavily in Hilton Head, *id.*, and use its hospital in the absence of its own, *id.*, para. 27; and its children share the same middle and high schools, *id.*, para. 28. Indeed, the ALJ opined that "Hilton Head has ... eclipsed Bluffton." *Id.*, para. 24 (Tr. citation omitted).

[39] *Pillar of Fire* is a "comparative renewal" case in which the Commission refused to even designate a §307(b) issue as between a Zarephath, New Jersey applicant and a Somerville, New Jersey applicant. Although those two cities are indisputably "separate communities," the Commission's hearing designation order noted the similarity of the proposed signal coverage and found that " ... the existing record does not justify a §307(b) issue." 90 FCC 2d at 1022 n.1.

Standard Comparative Issue

10. *Diversification of Control of Mass Media*. As we reiterate regularly, the factor of "primary significance" in any comparative analysis is diversification of control of the mass media. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). The ALJ's findings and conclusions on the *broadcast* ownership interests of the various applicants, as summarized at *I.D.*, para. 130, are impeccable and are not seriously challenged.[41] While an ownership interest in other broadcast properties is certainly not necessarily fatal to an applicant competing against those *without* broadcast interests, *see, e.g., Christian Broadcasting of the Midlands, Inc.*, FCC 84R-78, released October 31, 1984 (applicant with two very distant broadcast interests prevails because of "moderate to substantial" preference for comparative coverage), such broadcast interests — as a practical matter — become dispositive unless the interest-burdened applicant demonstrates some decisional preference(s) under the secondary *Policy Statement* criteria (*e.g.*, "integration of ownership and management," "comparative coverage," *see infra*). The two applicants without any chargeable *broadcast* interests in this case, Williams and WBC, also propose 100% integration of ownership and management, *see I.D.*, paras. 58-64 (WBC), 100 (Williams). Ergo, the other competing applicants are effectively eliminated from further comparative vitality.[42]

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[40] As it turns out, Plantation's other attributable media interests, *see I.D.*, para. 106, place it significantly below WBC and Williams on a comparative scale, and effectively out of the running. *See infra* para. 19 and note 68.

[41] A challenge we consider non-serious is Heritage's exception to the finding that Williams has no other broadcast interests; it asserts:

> First, the ALJ did not change Williams with any media interests even though there is no record evidence supporting that conclusion. Williams had the burden of proceeding and the burden of proof under the standard comparative issue, 47 U.S.C. §309(e) (1976), but he failed to meet these burdens entirely. He therefore could not claim credit for any preference under the diversification issue.

Heritage Exceptions at 27-28. Heritage does not even allege that Williams has any other media interests, the absence of which we may substantially notice from FCC records, *see* 5 U.S.C. §556(e); *see generally City of New York Broadcasting System* v. *FCC*, No. 83-663 (D.C. Cir. filed September 21, 1984), slip op. at n.17, and, in any event, we accept Williams' affidavit to that effect, as did the ALJ. *See I.D.*, para. 99.

[42] Although Plantation, apparently, does not propose high overall coverage, *see I.D.*, para. 5, any preference here — unlike the winning applicant in *Christian Broadcasting of the Midlands, supra*, who proposed substantial service to unserved and underserved areas

11. As for our two remaining applicants without any other attributable broadcast interests, WBC excepts to the ALJ's imposition of a comparative demerit based upon attributed interests in two cable television systems.[43] Cable systems are cognizable media of mass communications for comparative selection purposes, *Greater Wichita Telecasting, Inc.*, 55 RR 2d 926, 929 (1984)[44], but "CATV interests have traditionally been less important for diversification purposes than broadcast interests, since broadcast stations provide unique local and informational programming to their communities of license and adjacent areas." *Id.*, at 929.

12. Charged to WBC was an interest in Edisto Beach Cable TV, Inc., which has a South Carolina system 65 miles from Hilton Head; at the writing of the *I.D.*, that system had 210 subscribers and hoped for 600. *I.D.*, para. 57. The nexus to the WBC applicant is that, in return for guaranteeing a loan to their relative, Ronald Harvey (80% owner of CATV system), two of WBC's three principals (33⅓% each) were orally promised convertible debentures for Edisto Beach Cable. *Id.*[45]

— would be no more than slight. "Slight" is the magnitude of preference awarded for only "overall coverage superiority," *Simon Geller*, 90 FCC 2d 250, 276 (1982) (subsequent history omitted), and Plantation does not except to the ALJ's finding that all geographic areas to be covered by the instant applicants are well-served, *I.D.*, paras. 6-7, or that none will serve 'white' or 'gray' areas. *Id.*, para. 120 (*reprinted supra* note 33). Plantation's "slight" overall coverage preference, if any, could not overcome its diversification disadvantage as to WBC and Williams, because the *mortalis* applicant (Mrs. Gilda Smithwick) was properly charged, *inter alia,* with her husband's 30% interest in a Greensboro, North Carolina TV permit. *See I.D.*, para. 106. A spouse's media ownership interests are attributable, at least for diversification purposes. *Compare Alexander S. Klein, Jr.*, 86 FCC 2d 423, 425-427 (1981) *with Absolutely Great Radio, Inc.*, 95 FCC 2d 1023 (1983), *recon. denied*, 56 RR 2d 261 (1984), *appeals pending sub nom. Ventura Broadcasting Co.* v. *FCC,* No. 83-2167 *et al.* (D.C. Cir. 1983, 1984).

[43] *See* WBC Exceptions at 33-39, excepting, essentially, to *I.D.* paras. 133 and 138. As the ALJ also noted, the WBC principals have some "direct and indirect interest in the Hargray Telephone Company." *I.D.*, at para. 136; *see also id.* at paras. 47-52. Without going into great detail, we wholeheartedly concur with the ALJ's analysis of *Brindlee Broadcasting Corp.*, 56 FCC 2d 138 (Rev. Bd. 1975). *See I.D.*, para. 136. A common carrier interest is not an interest in a medium of mass communications relevant to the promulgation of divergent viewpoints, and, *standing alone*, a common carrier is not a media "voice" within the purport of the *Policy Statement.* Indeed, the very concept of a common carrier may be antipodal to the concept of control over a media voice. *Cf.* 47 U.S.C. §153(h); *but cf. NCTA* v. *FCC*, No. 82-1058 (D.C. Cir. filed November 9, 1984) (aff'g FCC policy permitting telco ownership of local CATV systems in "rural" areas).

[44] *Modifying* 90 FCC 2d 1046 (Rev. Bd. 1982), *recon. denied*, 92 FCC 2d 780.

[45] This is an opportune moment to explain that WBC's three equal (33⅓%) principals are Engle C. Harvey, Yvonne Harvey Beach, and Sybil Smith Harvey. *I.D.*, para. 45. As to the Edisto Beach CATV system, only Yvonne Harvey Beach co-signed the note underlying the subject debentures. *Id.*, para. 57. However, Leroy Harvey III, husband of Sybil Smith Harvey (*id.*, para. 50) also co-signed the note; thus under the spousal attribution of *Alexander S. Klein, Jr., supra* note 42, 86 FCC 2d at 425-427, if the convertible debentures are chargeable to Leroy Harvey III, they are likewise chargeable

13. We need not plumb this matter deeply, nor the state of any Carolina "Statute of Frauds," to determine whether the orally promised convertible debentures shall be constructed into an immediately cognizable media interest chargeable to WBC.[46] Even, *arguendo*, were the debentures cognizable,[47] we fully agree with the ALJ that " ... the Edisto Beach Cable System ... must be considered a small system of insignificant comparative weight." *I.D.*, at para. 133. To employ a favorite phrase of the late Senator Everett Dirksen, the Edisto Beach Cable System has all the impact on the diversity of media voices in the Hilton Head area (or the entire region) "as a snowflake upon the bosom of the Potomac."

14. More "significant," but nonetheless of comparatively little weight, is the subscription to 28.6% of the stock of the Hargray CATV Company, Inc. by WBC principals (or their spouses). *See I.D.*, paras. 53-56, 134-135.[48] We initially find that stock subscriptions are immediately recognizable ownership interests. *See Peoples Broadcasting Corp.*, 92 FCC 2d 1303, 1323 n.31 (Rev. Bd. 1983), *recon. denied*, 94 FCC 2d 429, *review denied*, FCC 83-594, released December 15, 1983 (Comm'n). The Hargray CATV system, which commenced operation in April 1983,[49] serves approximately 540 in Hardeeville, South Carolina (20 miles from Hilton Head), 300 subscribers in Ridgeland (35 miles from Hilton Head), and 135 in Estill, South Carolina (65 miles from Hilton Head).[50] That system passes 3400 homes in its service area, but the ALJ found that " ... the maximum number of subscribers expected to be served by the system is approximately 1600-1700."[51] While it appears that the Hargray system will not fall within the proposed service area (1 mV/m (or "primary service")

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to his wife for diversification purposes. While WBC excepts to being charged with a cognizable ownership interest in Edisto Beach CATV (claiming that no debentures were ever issued or contemplated, *see I.D.*, para. 57), it does not challenge *per se Klein's* spousal attribution principle.

[46] WBC asserts that " ... convertible debentures are not recognized as a present media interest." WBC Exceptions at 38-39. It may be mainly correct, at least insofar as their impact on diversification of the media. *See Multiple Ownership Rules* (Attribution of Ownership), 55 RR 2d 1465, 1484 (1984).

[47] Cases decided prior to the Commission's adoption of *Multiple Ownership Rules*, above note, generally held that unconditionally convertible interests were held against the applicant for diversification purposes. *See, e.g., Radio Laredo, Inc.*, 87 FCC 2d 353, 354 & n.14 (Rev. Bd. 1981) (stock options cognizable), *review denied*, FCC 82-62, released February 3, 1982 (Comm'n), *aff'd sub nom. Amigos Broadcasting, Inc.* v. *FCC*, 696 F.2d 128 (D.C. Cir. 1982).

[48] Again, under *Alexander S. Klein, Jr.*, any spousal ownership interest in this cable system would be attributable to the respective WBC principal(s).

[49] *I.D.*, para. 54.

[50] *Id.*, para. 55.

[51] *Id.* (citations to record omitted).

contour) of WBC's intended station, *see generally I.D.*, para. 135,[52] it is certainly a nearby media interest of significant size[53] and germane to the *Policy Statement's* concern with local or regional media interests.[54]

15. "In March 1983, the WBC principals and/or their husbands subscribed to 32,000 shares of stock (28.6 percent) in Hargray CATV Company, Inc. . . . ."[55] Nevertheless, WBC argues that it should not be charged with the stock subscription interests in Hargray CATV because[56]:

> No final decision or commitment was made by the WBC principals or their husbands to purchase the stock, no money was paid for the stock subscriptions or the stock, and the subscriptions are now terminated.

The "termination" of the stock subscriptions was reported by WBC by amendment of December 30, 1983.[57]

16. The general rule for the non-recognition of other media interests is, if the applicant pledges *prior to* the "B" cutoff date to divest those interests, those interests will not be charged against that applicant under the "diversification" criterion, *Alexander S. Klein, Jr., supra*, 86 FCC 2d at 427, and divestiture of the other interests will not then be considered comparative "upgrading" in prejudice of any competing applicant(s).[58] If an applicant's other media interests are acquired after the "B" cut-off date, a corollary rule applies, that rule stated accurately by WBC[59]:

> However, where no [other media] interest exists at the B cut-off date, a promise to divest made *when the interest is acquired* isolates that interest from diversity consideration.

Thus, a post-"B" cutoff acquisition, accompanied by a contemporaneous pledge to divest if the applicant is successful in an instant hearing, will not be counted against that applicant, and any grant will be conditioned on the effectuation of the pledge to divest. *See Washington's Christian Television Outreach, Inc., supra,* 56 RR 2d at 1560; *Daytona Broadcasting, supra,* 55 RR 2d at 1335 & n.24; *High Sierra Broadcasting, Inc.*, 55 RR 2d 627, 635 (Rev. Bd. 1983).

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[52] *See also* WBC Exceptions at 37.

[53] When considered in relative terms, the "significance" becomes somewhat more clear. That is, while the Hargray system might serve several thousand *homes, I.D.*, para. 55, WBC's proposed FM station was found by the ALJ to serve only 20,231 *persons* in its "primary service" contour. *Id.*, para. 5. *But see infra* paras. 23-24.

[54] As we have repeated from *Greater Wichita, supra*, CATV systems are of lesser concern than broadcast stations from the standpoint of media "voices." Yet, with the growth of such phenomena as the Cable News Network, for example, cable is clearly moving away from its origins as a passive carrier of distant TV signals and becoming more of a media "voice" in its own right. *See, e.g., Children's Television Programming*, 55 RR 2d 199, 208 (1984); *Fairness Doctrine Inquiry*, 49 Fed. Reg. 20317, published May 14, 1984, at paras. 26-44.

[55] WBC Exceptions at 34 (footnote omitted). *See also I.D.*, paras. 54, 134-135. The cost of the stock would have been $32,000 ($1 per share). WBC Exceptions at 35 n.42.

[56] WBC Exceptions at 34 (record citations and footnote omitted).

[57] WBC Exceptions at 34 & n.41; *I.D.*, para. 135.

[58] For a more thorough discussion of the perils of "upgrading," *see Daytona Broadcasting, supra*, 55 RR 2d at 1329-1330.

[59] WBC Exceptions at 36 n.43 (emphasis added).

17. WBC seeks refuge in the aforestated corollary rule, claiming[60]:

> *A fortiori,* where as here the WBC principals and their husbands announced their divestment promise *before* any interest was ever acquired, there can be no question of their intentions if they ever come to own any cable interests. The divestment promise was not late, as Judge Stirmer found, because it preceded the acquisition of any interest.

But, Heritage rejoins[61]:

> On March 14, 1983, nearly a year after the "B" cut-off date, the WBC principals and/or their husbands executed stock subscriptions for a total of 32,000 (28.6%) of the stock of Hargray CATV Company, Inc. No divestiture commitment was made contemporaneously by these stock subscribers and it was not until April 7 that they executed divestiture statements. No contemporaneous divestiture statements having been made, the subsequent attempt to divest constituted an impermissible attempt to upgrade their comparative position.

Heritage is technically correct, as was the ALJ,[62] because we have held that a stock subscription, being an enforceable contract, is a present interest *at the time acquired*. Indeed, were we not to consider a stock subscription to represent a present corporate interest, many of our aspiring broadcast principals could not be considered to have a present interest in their own applicant entities, for they hold, in fact, nothing more than a subscription to the applicant entity's stock, a subscription they will presumably fulfill at a later date.[63]

18. Nonetheless, we will not charge the Hargray CATV interests against WBC under the circumstances here apparent. It seems stipulated by all concerned that, whereas the subscriptions were entered into on March 14, 1983, a pledge to divest any interest in Hargray CATV should WBC here prevail was made on April 7, 1983.[64] Particularly given the possible doubts as to the basic cognizability of stock subscriptions, we believe that WBC's divestiture statement was sufficiently "contemporaneous" to ward off the onus of a comparative diversification demerit (even

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[60] WBC Exceptions at 36 n.43 (emphasis in original).

[61] Heritage Reply at 6-7.

[62] *See I.D.*, paras. 134-135 & n.18.

[63] The recognition of a stock subscription as a present media interest looms vital in our comparative cases, for were a stock subscriber not considered to have a *present* ownership interest, that subscriber could receive no credit for integrating into station management. *See Peoples Broadcasting, supra,* 92 FCC 2d at 1323 n.31, 1325.

[64] *See I.D.*, para. 134; Heritage Reply at 6-7.

though that onus would be relatively slight in any event[65]). Just as we would not attribute, hereinabove, a "fictional" FM station to the town of Bluffton, we will not attribute a fictional CATV interest to the WBC principals. While legal fictions plainly have their utility,[66] they also have their limitations; when useful fiction turns to incredible fable, the utility that comes with consensual acceptance of the necessity of the fiction is lost. WBC's competitors were not prejudiced by its fleeting (post-"B" cutoff) flirtation with cable television stock, and we will not elevate form over substance on this matter, nor marry WBC to Hargray CATV for diversification purposes in light of the swift annulment.[67]

19. *Integration of Ownership with Management.* The ALJ's findings and conclusions on the important integration element of the Commission's comparative framework, *see Policy Statement, supra,* 1 FCC 2d at 395, are unchallenged in any decisional regard, save for the following exceptions of WBC.[68] Recognizing the closeness of its match with Williams, who — like WBC — proposes 100% ownership integration,[69] Williams' being "enhanced" by his FCC-favored minority status, *see West Michigan Broadcasting Co.* v. *FCC,* 735 F.2d 601 (D.C. Cir. 1984), *petition for en banc rehearing denied (August 2, 1984), petition for cert. pending* Case No. 84-700. WBC urges two critical alterations to the ALJ's treatment of the integration element of this case, to wit: (1)

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[65] Not only is the Hargray CATV system outside of the proposed FM station's primary service area and rather small, the WBC principals would have been charged with a 26.8% ownership interest in the system, or far less than a controlling interest.

[66] *E.g.,* the historic fiction that all are familiar with "the law."

[67] We recognize that, in our *Daytona Broadcasting* exegesis, we stated that " . . . the Board has attempted to alloy with chromium steel the procedural bar against comparative 'upgrading' . . . ." 55 RR 2d at 1330. But, charging the WBC principals with the fictional CATV interest would be akin here to hitting them on the head with a lead pipe, the temporal circumstances considered. Though "chromium steel" may alloy our procedural rule, we have likewise realized that " . . . when the Commission applies its procedural rules strictly it must remain mindful of the underlying purposes of those rules to ensure that rigidity does not override those purposes, justice, or equity." *Washington's Christian Television Outreach, supra,* 56 RR 2d at 1550 (*quoting Son Broadcasting, Inc.,* 92 FCC 2d 450, 452 (Rev. Bd. 1982)).

[68] We have heretofore restored Plantation to our comparative matrix. Had not its other chargeable media interests, *see I.D.,* para. 106, placed it well below Williams and WBC under our diversification criterion (the comparative "factor of primary significance"), Plantation's 100% integration proposal, "enhanced" by female ownership, *see Horne Industries, Inc.,* 56 RR 2d 665 (1984), would have stood it in relatively good comparative stead, for so long as it was not discredited. *See supra* note 31.

[69] Though WBC's integration proposal is also "enhanced" by its 100% female ownership, *I.D.,* para. 145, "minority ownership and participation has more significance as an enhancement factor than female ownership and participation." *Horne Industries,* above note, 56 RR 2d at 666. Just how much "more significant" is, for the nonce, problematic, and this problem is addressed more meaningfully in our ultimate conclusions, *see infra* para. 30.

Williams' integration credit, which is very slightly enhanced by a modest broadcast background, *I.D.*, para. 102,[70] should be diminished because of "Williams' admission that he is guilty of violating the Commission's policy against plugola ... "[71]; and (2) WBC's integration credit should be heightened by virtue of its "principals' long-term area residence and civic involvement."[72]

20. As to Williams' admitted "plugola" violations, we think that the two brief paragraphs devoted by the ALJ are more than sufficient to tell the entire story. *I.D.*, paras. 103-104. It seems that, while working as a parttime announcer, Williams would not only purchase paid advertising to promote gospel concerts in which he had a personal financial interest, he would sometimes sign-off with a "tag line" to the effect that: "The concert is tonight. Don't forget. I will see you there." *Id.*, at para. 104. Since there were only four concerts a year, and considering the innocuousness of the "tag line," the ALJ found that any violation of the Commission's "plugola" policy[73] was *"de minimis." I.D.*, at para. 142. If that handy bit of Latin ever could be regarded as overstatement, it surely would be so here, as a snippet of oral argument colloquy with counsel reprinted in the margin will attest.[74] In our view, Williams' purchase of paid advertising time to promote the quarter-annual concerts confirms his consciousness of, and fidelity to, our "plugola" policies.[75] Yet, struggling

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[70] Past broadcast experience is favorably considered, *see Policy Statement, supra*, 1 FCC 2d at 396. Since 1975, Williams has done some light announcing, *I.D.*, para. 102.

[71] WBC Exceptions at 15 (*see also id.* at 11-14). The ALJ had denied a separate issue on this matter, *see id.* at 11.

[72] *Id.*, at 28 (through 32). "Local residence and civic participation are significant because they indicate 'a knowledge of and interest in the welfare of the Community" which will be served by the licensee." *Id.*, at 28-29. (*quoting Absolutely Great Radio, Inc.*, 55 RR 2d 15, 21 n.22 (1983)). *See also Policy Statement*, 1 FCC 2d at 396.

[73] *See "Plugola" Rulemaking*, 76 FCC 2d 227 (1980).

[74] WBC COUNSEL: ... [Y]ou have to take a look at what the record says. Mr. Williams repeatedly testified that he does these concerts four times a year. He repeatedly testified that he's done this for eight years. So we're talking about 32 concerts over the course of eight years.

BOARD QUESTION: Thirty-two potential times when he said, 'See you at the concert tonight?'

WBC COUNSEL: Thirty-two potential times when he took advantage of his part-time employment to plug a concert in which he had an interest without telling the audience that, in fact, he got substantial money, half of his family income, from that activity.

* * * *

Tr. of Oral Arg. in Dkt. No. MM 83-158 (September 14, 1984), at 10-11.

[75] Although WBC, in the least of its indictment, charges Williams with "indifference" to our "plugola" policies, WBC Exceptions at 11, it nowhere challenges the ALJ's findings

for any slight advantage, WBC insists that Williams has demonstrated a pattern of misconduct which "... severely diminishes his proposed integration, because he is the only principal, and because he will be the proposed station's manager... ."[76] As a predictive matter (which is the *raison d'etre* that we recognize past broadcast experience), we find nothing on this record which would warrant diminution of Williams' integration proposal, and we affirm the *I.D.* on this matter. We are certain that Williams has been sufficiently sensitized (not to say traumatized) by this rhubarb over "plugola" so that future compliance with the subject policy is assured.

21. WBC next asserts error for the ALJ's failure to accord it credit for the "local" residence and civic participation of its three female principals. It submits[77]:

> All three women live in Hardeeville, South Carolina, which is 20 miles from Hilton Head, and all three visit the island frequently. Engle Harvey and Yvonne Beach are also involved in civic activities that provide them with further contacts on Hilton Head Island. Both women belong to the Eastern Star Lodge and the Ladies' Auxiliary of the Marine Rescue Squadron, organizations that include Hilton Head Island residents in their membership and that undertake civic and charitable activities on Hilton Head and throughout the service area. Furthermore, both Yvonne Beach and Sybil Harvey have been employed by the Hargray Telephone Company, in both the Hilton Head and Hardeeville offices, and Sybil Harvey was employed by a dentist on Hilton Head Island.

As noted, the *Policy Statement* holds that:

> Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, *but within the proposed service area.* Proposed future local residence (which is expected to accompany meaningful participation) will also be accorded less weight than present residence of several years' duration.

1 FCC 2d at 396 (emphasis added).[78] In *Waters Broadcasting Corp.*, 88

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that the concerts were attended by "... paid announcements prepared and broadcast by the station." *I.D.*, at para. 104.

[76] WBC Exceptions at 12. WBC's intensity over Williams' several impropitious valedictions is evinced by the fact that, with three lawyers on the exceptions, WBC devotes nearly five pages to this matter. Never in the venerable annals of communications law have so many written so much about so little.

[77] WBC Exceptions at 29-30 (record citations and footnote omitted). However, the Eastern Star Lodge is located not in Hilton Head, but Hardeeville. Tr. of Oral Arg., *supra* note 74, at 18. Nothing in the background of the WBC principals suggests a very deep knowledge of the particular problems and needs of Hilton Head, political, economic, social or otherwise.

[78] While Williams is entitled to some minor residence credit because he proposes to move to Hilton Head, *I.D.*, para. 142, the three WBC principals do not propose such a move, but propose to commute the 20 miles from their homes in Hardeeville. *See* WBC Exceptions at 29 & n.33. Although the WBC principals do not propose to move to Hilton Head, we will not vitiate their basic integration credit. *See Radio Jonesboro*, 96 FCC 2d 1106, 1108 (Rev. Bd. 1984) (Bd. M'br. Blumenthal not participating), *Merrimack Valley Broadcast-*

FCC 2d 1204 (Rev. Bd. 1981), and relying on numerous cases, we awarded an applicant only "slight enhancement" for past local residence because its sole principal lived outside the community of license, but within the primary service area, and her civic activities were also outside of the community of license. *See id.*, at 1210. But, acknowledging that "... some previous cases have indicated that civic activities outside of the principal community are 'not meaningful in relationship to service to the proposed community,'" the Commission changed its policy to "moderate" because both the residence and the civic activities were within the primary service area. *See* 91 FCC 2d 1260, 1262-1263 & n.10.[79]

22. In the instant case, the WBC principals do not live in the proposed community of license *or* within the primary service area, have never lived there, do not propose to move there, and the civic activities shown on this record purported to have some relationship to Hilton Head (or, indeed, the primary service area) are negligible. *See I.D.*, paras. 59-66.[80] Accordingly, it will receive no basic local residence credit (past, present, or future), and its credit for civic activities related to Hilton Head will perfectly reflect their extent: negligible. At best, any marginal WBC credit here would be offset by the slight credit due Williams for his proposal to move to the city of license. *See I.D.*, paras. 100, 142.

23. *Comparative Coverage.* WBC would appear to have a more legitimate grievance respecting the ALJ's refusal to accord it a slight comparative preference because it proposes, overall, to serve a greater geographic area and population than Williams (or the other competing applicants).[81] We start this facet of our review by observing that the *Policy Statement* does afford comparative credit for superior signal coverage. 1 FCC 2d at 398-399; *Christian Broadcasting of the Midlands, Inc., supra.* The strength of any such credit depends on the degree to which an applicant will serve, to use our terms-of-art, "unserved" or "underserved" areas. Where all areas proposed to be served by the applicants already receive adequate broadcast service, as is the case here,

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ing, Inc., 92 FCC 2d 506, 515-516 (Rev. Bd. 1982), *aff'd* 55 RR 2d 23 (1983)(Comm'n), *remanded on other grounds*, FCC 84-496, released October 23, 1984.

[79] The reviewing court in *West Michigan Broadcasting, supra*, thoroughly considered this matter and approved of the Commission's novel treatment. *See* 735 F.2d at 607-608.

[80] *See also* WBC Exceptions at 29-30. *Radio Jonesboro, supra* note 78, relied upon heavily by WBC, is not to the contrary. There, although a proposed applicant proposed not to move to the city of license (like the WBC principals, commuting was planned), that applicant's principal had appreciably more civic experience in the city of license, *see* 55 RR 2d at 994 (para. 5); and, even there, the civic activities were not given much comparative weight. *See id.*, at 997 (para. 14).

[81] WBC Exceptions at 21-27.

see I.D., paras. 6-7, 120[82], the highest comparative preference any applicant could receive for "overall" coverage superiority is "slight." *Simon Geller, supra*, 90 FCC 2d at 276.[83] WBC understands and accepts the outside limit of its potential preference,[84] but nonetheless demands at least that.

24. As the record reflects, WBC's coverage from its originally proposed site would have encompassed 358 square miles and 37,067 persons.[85] However, after filing its original application — but prior to the commencement of this hearing[86] — WBC amended its application to specify a new site, its original proposal having been effectively negated by the action of the Hilton Head airport on September 9, 1983. Until that action, the FAA had essentially approved WBC's site, subject to two conditions, conditions WBC was pleased to satisfy.[87] Claiming unforeseen circumstances, WBC tendered an engineering amendment on September 20, 1983, asserting that the involuntary change occasioned by the airport's action permitted acceptance of the amendment under the "good cause" test for assaying post-hearing designation amendments set forth in 47 CFR §73.3522(b).[88] By *Memorandum Opinion and Order*, FCC 83M-3933, released October 31, 1983, the ALJ found that the airport's *volte*

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[82] *See also supra* para. 9 & note 33. Factoring in the recently granted construction permit for Port Royal, S.C., " . . . all population proposed to be served will receive five aural services both day and night." *I.D.*, para. 120.

[83] *See also supra* note 42. For a comprehensive discussion of the scale by which progressive coverage credits are weighed, *see Christian Broadcasting of the Midlands, Inc., supra*, FCC 84R-78 at para. 9.

[84] *See* WBC Exceptions at 21 (seeking "slight preference for its superior coverage proposal.")

[85] *See id.*, at 26.

[86] *See I.D.*, para. 3 and n.2.

[87] As succinctly reported by WBC antagonist, Heritage, the conditions were as follows:

> Eleanor J. Williams, an FAA representative, indicated (a) that if on-airport weather reporting was available and (b) the MDA (Minimum Descent Altitude) for the Hilton Head approach remained 560 feet AMSL, a structure having the height and location proposed by WBC would not be hazardous to air navigation.

Heritage Exceptions at 36 (objecting to the acceptance of WBC's site amendment). Nowhere is it alleged that WBC was not ready, willing or able to meet the FAA's conditions; indeed, it was. WBC Exceptions at 21 & n.22.

[88] The Commission has adopted a six-point "good cause" test under 47 CFR §73.3522(b):

> (1) the amendment was prepared with due diligence; (2) was not required by the voluntary act of the applicant; (3) will not necessitate modification or addition of issues or parties; (4) will not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) will not unfairly prejudice other parties; and (6) will not cause the applicant to gain a comparative advantage.

Erwin O'Conner Broadcasting Co., 22 FCC 2d 140, 143 (Rev. Bd. 1970). *See also* §73.3522(b)(1)(adopting stricter "unforeseeability" test for engineering amendments).

face was "unexpected" and that "the unforeseeability test has . . . been met"; that "WBC moved diligently to secure a new site and submitted its amendment in a timely fashion"; that "[t]he hearing has not been disrupted"; and, consequently, that " . . . under the rather unique circumstances presented, WBC has established good cause for acceptance of its amendment." *Id.*, at para. 6.[89]

25. Despite finding that WBC had met the "good cause" test and accepting its engineering amendment, the ALJ — asserting the need to protect the other applicants from "prejudice" — refused to credit WBC with the fact that its new site would entail a greater signal coverage superiority over the other applicants than its original site. *See id.*, at para. 7 and *I.D.*, n.2.[90] Indeed, the ALJ not only refused to credit the new signal coverage superiority, he vitiated the superiority WBC would have had from its original site, constructively awarding it the same coverage proposed by another applicant, Santee Cooper: *i.e.*, 186 square miles and 20,231 persons. *I.D.*, para. 5 & n.2.

26. Relying chiefly on *California Broadcasting Corp.*, 90 FCC 2d 800 (1982), WBC contends that it is entitled to the actual signal coverage advantage it will provide from its new site.[91] In *California Broadcasting*, and carefully applying the "good cause" test,[92] the Commission (on interlocutory appeal) permitted an applicant to amend six months after an applicant became aware of potential governmental problems with its site. Although the amending applicant there was aware, in December 1980, that the U.S. Department of Interior would oppose its location of a transmitter on a National Park,[93] it did not begin to look for a new site until February 1981, nor seek to amend until June 19, 1981. 90 FCC 2d at 803. More to the point here, the Commission not only permitted the

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[89] We have carefully reviewed the underlying material and reject the exceptions to the ALJ's acceptance of the WBC engineering amendment. The stricter "good cause" test was properly met.

[90] From its new site, WBC would cover 408 square miles and 41,045 persons (compared to its original 358 square miles and 37,067 persons). WBC Exceptions at 26.

[91] At a minimum, and if a "constructive" coverage factor is to be assumed, WBC claims its entitlement to the superior coverage it would have had from its *original* site, *see* WBC Exceptions at 22, in part because it has " . . . throughout this proceeding [attempted] to provide superior coverage." *Id.*, at 24.

[92] Indeed, in addition to the general "good cause" criteria for engineering amendments such as those involved in *California Broadcasting* and WBC's in this case, there is an additional test under 47 CFR §73.3522(b)(1): "that the change be 'necessitated by events which the applicant could not reasonably have foreseen.' " 90 FCC 2d at 804. The Commission has termed this a " . . . stricter standard of foreseeability for engineering amendments." *Id.*, at 809.

[93] That applicant had filed its application on January 30, 1979, and specified Santa Cruz Island as its site. By Congressional action of March 5, 1979, that island was made a National Park. *See* 90 FCC 2d at 801.

engineering amendment, it explicitly recognized that acceptance of the amendment would totally erase the comparative signal coverage superiority held by a competing applicant and, thus, allow the amending applicant to comparatively "upgrade." *Id.*, at 811 n.41. Holding that "[t]he site change, and any prejudice [to the competing applicant] resulting therefrom, stems from events beyond the control of the applicant," the Commission declared that the previously designated "comparative coverage issue will therefore be moot." *Id.*

27. Without asserting that *California Broadcasting* is in every particular identical to our situation, none of the very minor factual distinctions seems to call for a different legal result respecting either: (1) the acceptance of WBC's amendment; or (2) the recognition of any correlative coverage improvements accruing as a result of such acceptance. We start with the proposition that post-designation amendments are not routinely accepted, but must meet a formidable "good cause" test. *See supra* note 88. Engineering amendments are subjected to a stiffer test. 47 CFR §73.3522(b)(1); *California Broadcasting*. But, once having overcome such hurdles, we see no reason to not recognize the factual changes reflected in an engineering amendment or to construct a "fictional" signal coverage factor. We appreciate that the ALJ was attempting to do "rough justice" by reducing WBC's signal coverage factor in the name of preventing "prejudice." But, once having found that an amendment fully meets the "good cause" test,[94] such a finding inherently embraces the conclusion that the other applicants will not be prejudiced "unfairly" (*see supra* note 88) by acceptance of the amendment. In other words, we see the post-designation engineering amendment process as essentially "go/no-go"; if the "good cause" test is not met, the engineering amendment should be rejected. *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 1029, 1032 (Rev. Bd. 1983).[95] *See also Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320-1326 (1978). If, conversely, an applicant such as WBC overcomes the very strict test for the acceptance of engineering amendments, it would seem that the amending applicant may benefit by any comparative "upgrading" coincidental thereto. *See*

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[94] The ALJ appears to have hedged on whether that test had been *fully* met. That is, while he found that WBC's site change request met the "unforeseeability" test, FCC 83M-3933, *supra*, at para. 6, he nonetheless held that " . . . the move to the new site . . . cannot be viewed as a totally involuntary act . . . ." *Id.*, at para. 7. *But see California Broadcasting*, 90 FCC 2d at 810 (para. 20).

[95] *See also Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *review denied*, FCC 84-119, released April 2, 1984, *appeal pending sub nom. Royce Int'l Broadcasting Co.* v. *FCC*, No. 84-1168 (D.C. Cir.) It may be that rejection of an engineering amendment will disqualify an applicant absolutely. Yet, the "good cause" test is intentionally strict to foster fair adjudication to competing parties and to ensure orderly progress of the proceeding.

California Broadcasting, 90 FCC 2d at 811 n.41.[96] That result contains two ingrained byproducts: (1) it spares the necessity of deciding upon a proper "constructive" coverage factor and, as before, lessens the number of "fictions" undergirding a decision; and (2) it permits an important licensing decision to be based on the *actual* coverage that the *public* might receive from the amending applicant. While fairness to competing applicants is essential, fairness to the listening public is at least so. WBC is entitled to its "slight" preference for superior comparative signal coverage.

28. *Miscellaneous*. The only remaining exceptions of possible import are those raised by WBC in which it contends that the ALJ erred in failing to add reporting (47 CFR §1.65) and financial issues against Williams. The former complaint is based upon Williams' failure to list on his application form that he and his wife were working at radio stations WKCN and WKTM(FM). Although these employment positions were reported in an amendment filed several months later, WBC argues that Williams was derelict in providing all required " ... information about principals' and their family members' interest in or connection with any radio or television station ... ."[97] WBC does not allege that either of the Williams had a "significant managerial role" at those stations, roles which might have had instant decisional significance,[98] and mere employment positions are not "interests" within the purport of FCC Form 301.[99]

29. WBC also points to the fact that Williams' $100,000 bank loan will be personally guaranteed by one William G. Dudley, III, and states that " ... the critical question of why Mr. Dudley would agree to expose himself to this substantial financial obligation remained to be determined."[100] WBC does not question the efficacy of the Williams bank loan, and it clearly here seeks a "real party-in-interest" issue, not a financial one. The Commission has held many times that a hearing issue will not be added on pure speculation, but only upon factual allegations, dully attested, which raise substantial and material questions of fact. Dudley's

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[96] Had the *California Broadcasting* Commission wished the law on engineering amendments to operate as applied by the ALJ in this case, it could have permitted the engineering amendment so as not to effect a disqualification of that applicant, *but* held that applicant — "constructively" — to its prior coverage factor. Instead, the amending applicant's *new* and *actual* coverage was credited, despite the relative "upgrading."

[97] WBC Exceptions at 16.

[98] *See Policy Statement*, 1 FCC 2d at 394 n.5.

[99] *See* FCC Form 301 at questions 5-8. While the Williams' employment positions may be a "connection with any other broadcast station" (*e.g.*, question 8(b)), the applicant's oversight here was not part of any pattern of reporting failure or a "connection" of decisional consequence. In any event, it was voluntarily reported by amendment. No hearing issue was warranted. *See Gilbert Broadcasting Corp.*, 55 FCC 2d 579, 581-582 (Rev. Bd. 1975)(subsequent history omitted).

[100] WBC Exceptions at 19.

guarantee, standing alone, is insufficient to raise an issue, and WBC has not met its procedural burden. *See KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974)(articulating test for "real party-in-interest" issue); *see also* 47 CFR §1.229(d). Whereas WBC's "plugola" and "local residence" exceptions, *supra*, my be characterized as "grasping at straws," its exceptions here snag naught but thin air, and the ALJ's patient disposition of these matters is solidly affirmed.

Conclusion

30. After all is said and done, it comes down to an election between Williams and WBC.[101] In summary, Williams receives:

- 100% integration credit, fully "enhanced" by total minority ownership, plus slight credits for past broadcast experience and his proposed relocation to the community of license.

WBC receives:

- 100% integration credit, with a lesser "enhancement" for its total female ownership, plus a slight comparative signal coverage preference.[102] From a comparative standpoint, the above competitors are closer than two coats of paint, that paint, however, differing in degrees of pigmentation. Still, if we correctly apprehend the magnitude of the weight attending the respective qualitative "enhancements," Williams' status as a member of an FCC-favored minority group lifts his burgee to the top of the mast.[103] If, however, we overestimate the ultimate disparity between a minority "enhancement" and a female "enhancement,"[104] then new colors could surge based upon WBC's comparative signal coverage preference, a preference of palpable and measurable impact on the listening public.[105] Until more definitive guidance is available, perhaps in this very case, the ALJ's award to Williams is affirmed.

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[101] WBC correctly noted as much at oral argument. *See* Tr. of Oral Arg., *supra* note 74, at 6.

[102] Even were WBC ceded an ever-so-slight credit for its civic activities, this would not alter the relative balance one measurable gram.

[103] In *Horne Industries, Inc.*, 56 RR 2d 665 (1984), the Commission restated that "minority ownership . . . has more significance . . . than female ownership . . . ." While the original formulation was the Board's (albeit with a wholly different membership), *see Mid Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978); we had earlier in *Horne Industries* certified to the Commission the question of the relative comparative weights to be accorded minority and female ownership. *See* 91 FCC 2d 1193, 1197 (Rev. Bd. 1982)(*Certification Order*). The Commission returned the case for the Board's initial input. *See* 94 FCC 2d 815, 816 (Rev. Bd. 1983). Thus, the Commission's 1984 *Horne Industries* statement remains the exclusive instruction on this question.

[104] *Horne Industries* is not much help: there we were dealing with 15% minority *vis-a-vis* 100% female, and the female won. *See* 56 RR 2d at 666-67.

31. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Santee Cooper Broadcasting Company of Hilton Head, Inc. on June 27, 1984, by Heritage Broadcasting Corporation on June 27 and November 30, 1984, and by Jesse N. Williams, Jr. on October 24, 1984 ARE GRANTED, and the amendments ARE ACCEPTED; and

32. IT IS FURTHER ORDERED, That the motion for expedited action filed July 17, 1984 by Jesse N. Williams, Jr. IS DISMISSED as moot; and

33. IT IS FURTHER ORDERED, That the application of Jesse N. Williams, Jr. (File No. BPH-820129AR) for a new FM broadcast station at Hilton Head Island, South Carolina IS GRANTED; that the application of Santee Cooper Broadcasting Company of Hilton Head, Inc. (File No. BPH-810722AA) IS DISMISSED; and that the applications of Women's Broadcasting Coalition, Inc. (File No. BPH-820128AT), Heritage Broadcasting Corporation (File No. BPH-820129AJ), Plantation Broadcasting Corporation (File No. BPH-820129AW), and Reginald Taylor and G. Troy Mattox d/b/a Calibogue Sound (File No. BPH-820129BT) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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[105] As we have just noted again in *Christian Broadcasting of the Midlands, Inc., supra*:

> [U]nlike the other criteria for evaluating comparative proposals, engineering coverage is the least likely to be changed. Local owners may move away or sell out to outsiders. Integrated owners may decide to entrust daily management to salaried staff. But significant technical changes cannot be made except on applications to, and approval of, the Commission.

Id., at n.7 (*quoting Chapman Radio and Television*, 19 FCC 2d 185, 236 n.38 (ALJ 1968), *aff'd*, 19 FCC 2d 157 (Rev. Bd. 1969)).

FCC 84D-38

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Santee Cooper Broadcasting Company of Hilton Head, Inc. Hilton Head Island, South Carolina	MM Docket No. 83-158 File No. BPH-810722AA
Women's Broadcasting Coalition, Inc. Hilton Head Island, South Carolina	MM Docket No. 83-161 File No. BPH-820128AT
Heritage Broadcasting Corporation Hilton Head Island, South Carolina	MM Docket No. 83-162 File No. BPH-820129AJ
Jesse N. Williams, Jr. Hilton Head Island, South Carolina	MM Docket No. 83-164 File No. BPH-820129AR
Plantation Broadcasting Corporation Bluffton, South Carolina	MM Docket No. 83-167 File No. BPH-820129AW
Reginald Taylor and G. Troy Mattox D/B/A Calibogue Sound Hilton Head Island, South Carolina	MM Docket No. 83-173 File No. BPH-820129BT
CP For New FM	

Appearances

Robert E. Kelly on behalf of Santee-Cooper Broadcasting Company of Hilton Head, Inc.; *John C. Bankson, Jr.* on behalf of Ocean Broadcasting, Inc.; *Susan Wing, Katherine A. Schoff* and *William S. Reyner* on behalf of Women's Broadcasting Coalition, Inc.; *Richard F. Swift* on behalf of Heritage Broadcasting Corporation; *Mark E. Fields* and *Jerrold Miller* on behalf of Jesse N. Williams, Jr.; *Rainer K. Kraus* and *Gregory C. Staple* on behalf of Tradewinds Broadcasting, Ltd.; *Jeffrey D. Southmayd* on behalf of Port Royal Broadcasting, Inc.; *Gary S. Smithwick* and *Robert L. Olender* on behalf of Plantation Broadcasting Corporation; *J. Richard Carr* on behalf of Tantamount Communications Company, Ltd.; *Ramsey L. Woodworth* on behalf of WBSL, Inc.; *Michael R. Miller* on behalf of Constance J. Wodlinger; *John Feore* and *Thomas J. Hutton* on behalf of Suncoast Radio-South Carolina Corp.; *Edward W. Hummers, Jr.* on behalf of Charles A. Brooks; *Gene A. Bechtel* and *Ann C. Farhat* on behalf of Reginald Taylor and G. Troy Mattox d/b/a Calibogue Sound and *Joseph A. Belisle* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: May 23, 1984; Released: May 31, 1984

Preliminary Statement

1. By *Hearing Designation Order*, 48 Fed. Reg. 10918, published March 15, 1983, the Commission, by the Chief, Mass Media Bureau, designated the six captioned mutually exclusive applications for hearing.[1] Five applicants proposed Hilton Head Island, South Carolina as the city of license; the other applicant (Plantation Broadcasting Corporation) proposes Bluffton, South Carolina as its city of license. The Order of Designation specified the following issues:

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[1] The applications of ten other applicants originally designated for hearing in this proceeding have been dismissed with prejudice pursuant to their own motions. The applications of Suncoast Television, Inc., Charles A. Brooks, Island Communications, Inc. and Ocean Broadcasting, Inc. were dismissed by Order, FCC 83M-2510 (released August 15, 1983); the application of WBSL, Inc. by Order, FCC 83M-3446 (released September 29, 1983); the application of Port Royal Broadcasting, Inc. by Order, FCC 83M-3926 (released October 31, 1983); the application of Tradewinds Broadcasting Limited by Order, FCC 83M-3927 (released October 31, 1983); the application of Suncoast Radio-South Carolina Corp. by Order, FCC 83M-4832 (released December 27, 1983); the application of Tantamount Communications Company, Ltd. by Order, FCC 84M-973 (released February 27, 1984); the application of Constance J. Wodlinger by Order, FCC 84M-972 (released February 27, 1984).

(1) To determine the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations.

(2) To determine whether there is a reasonable possibility that the tower height and location proposed by Santee-Cooper Broadcasting Company and WBC would constitute a hazard to air navigation.

(3) To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

(4) To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

(5) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. The air hazard issue directed against Santee-Cooper Broadcasting Company of Hilton Head, Inc. was favorably resolved by Summary Decision (FCC 83M-2080, released June 24, 1983). The air hazard issue directed against WBC was favorably resolved by Summary Decision (FCC 84M-1973, released April 26, 1984).

3. A prehearing conference was held on May 12, 1983. Evidentiary hearings were held on September 27, 28, 29 and 30 and on October 3, 1983. The record was closed on October 3, 1983. Proposed Findings of Fact and Conclusions were filed on January 3, 1984 and Reply Findings were filed on January 27, 1984.

Findings of Fact

4. This proceeding involves the mutually exclusive applications of Santee-Cooper Broadcasting Company of Hilton Head, Inc. (Santee-Cooper), Women's Broadcasting Coalition, Inc. (WBC),[2] Heritage Broadcasting Corporation (Heritage), Jesse N. Williams, Jr. (Williams) and Reginald Taylor and G. Troy Mattox d/b/a Calibogue Sound (Calibogue) to construct a new FM station at Hilton Head Island, South Carolina and the mutually exclusive application of Plantation Broadcasting Corporation (Plantation) to construct a new FM station at Bluffton, South Carolina.

Comparison of Coverage

5. The areas and populations within the 1 mV/m (primary service) contour of each of the proposals are as follows (Joint Ex. 1, p. 8):

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[2] By Order released October 21, 1983 (FCC 83M-3933), the Presiding Judge accepted an engineering amendment filed September 20, 1983 by WBC. In accepting the amendment, the Presiding Judge ruled that for comparative purposes, WBC's coverage would be deemed identical to Santee-Cooper's. The findings are consistent with that ruling.

Applicant	*Primary Service Area* (sq. mi.)	*Population*
Santee-Cooper	186	20,231
WBC	186	20,231
Heritage	287	27,531
Williams	325	31,986
Plantation	433	37,397
Calibogue	325	31,986

Other Available Services

6. During the daytime, the area within the 1 mV/m contour proposed to be served by each of the applicants receives five or more primary aural services (Joint Ex. 1, p. 4).

7. At night, the number of presently available aural services within the uncommon areas ranges from two to five or more. The following table shows the uncommon areas and populations that presently receive four or fewer primary aural services (Joint Exs. 1 and 2).[3]

Nighttime Available Services

	2 Services		*3 Services*		*4 Services*	
Applicant	*Area*	*Pop.*	*Area*	*Pop.*	*Area*	*Pop.*
Santee-Cooper	–	–	–	–	0.6	–
WBC	–	–	–	–	0.6	–
Heritage	–	–	4.3	–	6.4	72
Williams	0.6	–	2.7	–	6.4	580
Plantation	–	–	6.4	–	4.8	72
Calibogue	0.6	–	2.7	–	6.4	580

Section 307(b) Considerations

8. As noted, Santee-Cooper, Heritage, Williams and Calibogue have applied for Hilton Head Island. Plantation has applied for Bluffton. Both communities are located in Beaufort County, South Carolina. Bufford County has a population of 65,364 according to the 1980 census.

9. Hilton Head Island currently has two radio stations: WHHR (AM) and WHHQ(FM) (Plantation Ex. 6 at 18; TR. 645; HHI Joint Ex. 1 at 5). The stations are co-owned. *Id.*

10. Bluffton has no local radio or television station, but was recently assigned FM Channel 296A. *Report and Order*, Mimeo No. 6736 (released September 27, 1983). That channel can be used only for a Bluffton station.[4] Both Inter-Island Broadcasters, the petitioner in the rulemaking, and Bluffton Radio Associates have pledged to apply for and build a

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[3] The recently granted FM station in Port Royal, South Carolina (BPH-800519AF) will cover 100% of the 1.0 mV/m service area of all applicants and thus will add one more aural service to each column.

[4] Under the former "10-mile" rule, an applicant could propose to build an FM broadcast station in any unlisted community within ten miles of a community assigned a frequency. 47 C.F.R. §73.203(b) (1982). However, the Commission eliminated the 10-mile rule in *The*

station on Channel 296A in Bluffton. *Report and Order, supra,* at paras. 2 and 3.

Hilton Head Island

11. Hilton Head Island, South Carolina (Hilton Head or the island), lies just off South Carolina's coast (HHI Joint Ex. 1 at 1). It is the business, commercial and tourism center of the surrounding area, including Bluffton (WBC Ex. 7). The island's permanent population at the time of the 1980 census was 11,344. It is now estimated to be 13,500, and is projected to increase to 14,700 by 1985. In 1982, more than 680,000 vacationers visited Hilton Head. During the peak resort months, the island's population increases to as many as 35,000 to 40,000 (HHI Joint Ex. 1 at 1).

12. In 1980, there were 9,434 housing units on Hilton Head, 4,634 of which were occupied year round. The median household income on Hilton Head was $23,854 and the median family income was $26,749. *Id.* at 2.

13. Hilton Head's major economic activities are tourism, land development, home building, real estate, professional services and retail businesses. The island has approximately 950 businesses employing more than 12,000 workers. 58% of the employee's reside on the island, and 42% reside off the island. The island's payroll is approximately $135 million. The total gross sales of goods and services on Hilton Head in 1981 was $429,804,846. *Id.*

14. In 1982, 1,683 building permits were issued for the construction of all types of structures; these permits authorized the construction of approximately $76 million worth of multi-family dwellings and $36 million worth of single family dwellings. Real estate sales on Hilton Head in 1980 totalled approximately $300 million. *Id.* at 3.

15. On Hilton Head Island, there are 5 major resort communities and 7 major condominium developments, offering more than 4,000 rental condominiums, villas and homes. In addition, there are 5 major motels or hotels on Hilton Head with approximately 1,500 rooms. There are 17 golf courses, 200 tennis courts, 6 marinas and more than 100 restaurants on the island. *Id.*

16. Hilton Head is connected to the mainland by a four-lane bridge. During 1982 more than 12,000 cars a week crossed the bridge traveling to and from the island. The island airport has a 3,700 foot runway which accommodates most small jets and propeller aircraft. Hilton Head is served by the Beaufort-Jasper Regional Transportation Authority, which provides public bus service around the island and connects Hilton Head with nearby mainland communities. *Id.* at 4.

Suburban Community Policy, the Berwick Doctrine and the De Facto Reallocation Policy, 53 RR 2d 681 (1983).

17. On May 10, 1983 the island's citizens voted to incorporate the entire island into the Town of Hilton Head Island. 4,551 residents voted in the town's first election held in Hilton Head on August 5, 1983. The town has a council-manager form of government, and a professional city manager. *Id.*

18. There are two newspapers on Hilton Head, one published weekly and the other published twice a week. There are seven magazines published on the island, four of which are published weekly and the remainder of which are available monthly. The island is also served by a 13-channel cable television system. *Id.* at 5.

19. Police service is provided by the Beaufort County Sheriff's Department, which maintains an office on the island serving the Hilton Head Island-Bluffton area. Five deputies are on patrol on a 24-hour basis. The Sea Pines-Forest Beach Fire Department and the Hilton Head Fire Department serve the island. The island, as well as the rest of Beaufort County, participates in an electric cooperative with three other South Carolina counties. The island also has public water and sewage facilities and two private refuse collection services. *Id.* at 6.

20. There is a public elementary school on Hilton Head Island that serves Hilton Head residents (TR. 625). Hilton Head Island High School, when complete, will serve high school students from both Hilton Head and Bluffton (TR. 625-26). Children in grades 6 through 8 from Hilton Head and Bluffton will attend a middle school located in Bluffton. *Id.* There are two private schools in the area, the May River Academy on the mainland and Sea Pines Academy on Hilton Head (TR. 626, 641-42). Both draw their enrollment almost exclusively from Hilton Head Island families (TR. 626).

21. The Hilton Head Hospital is a private, non-profit, fully certified medical facility with 80 beds. The hospital offers a full range of therapeutic and diagnostic services. It maintains a 24-hour emergency room and a professional building housing 13 physicians in private practice. There are more than forty practicing physicians and 10 practicing dentists on the island. Twenty-five of the doctors are on the hospital's active staff, and five of the dentists are on the hospital's courtesy staff. The Hilton Head Hospital serves patients from both the island and nearby mainland communities (HHI Joint Ex. 1 at 5).

22. Hilton Head has more than 100 community, civic and professional organizations including at least four nationally affiliated service clubs. There are more than 20 churches located on the island, serving every major denomination. *Id.* at 6.

Bluffton

23. Bluffton, South Carolina is an incorporated town in Beaufort County (HHI Joint Ex. 1 at p. 7). Its town limits cover 426.1 acres, less than one square mile (Plantation Ex. 6 at 1; TR. 483). In 1980, Bluffton's

population was 541 (Plantation Ex. 6 at 1). In 1970, the population was 529 (HHI Joint Ex. 1 at 12; TR. 482); in 1920, the population was 480 (Plantation Ex. 6 at 9).

24. In the early part of this century, Bluffton was the center of lower Beaufort County (TR. 655). It was a thriving resort community, and there was active development of nearby recreation areas (Plantation Ex. 6 at 8-9). The town itself was a center of commerce for the area (TR. 655). There were as many as ten commercial establishments operating along Calhoun Street, the main commercial street in Bluffton, and there were four seafood operations located on Bluffton's waterfront (Plantation Ex. 6 at 9-10; TR. 505). Hilton Head has since eclipsed Bluffton (TR. 655). There are only two or three businesses located on Calhoun Street, and there is no operating seafood industry in the town (TR. 503, 505). Bluffton has no tourist accommodations and only one restaurant (TR. 632). Furthermore, Bluffton wants to maintain the present character of the community and has taken affirmative steps to limit development, such as rejecting a sewer system (TR. 636-37).

25. Presently, there are 235 housing units in Bluffton (HHI Joint Ex. 1 at 7). There are approximately 20 commercial establishments employing a total of 68 to 86 people, most of whom are not Bluffton residents (TR. 610-21, 632).[5] In 1982, Bluffton businesses generated $3,652,528 in gross retail sales of goods and services (HHI Joint Ex. 1 at 7). Most residents of Bluffton work on Hilton Head Island (TR. 632, 640, 651). Residents of Bluffton go to Savannah, Hilton Head or Beaufort to purchase clothing (TR. 632). They also go outside Bluffton to purchase automobiles and furniture (TR. 650).

26. Bluffton has a mayor/council form of government (Plantation Ex. 6 at 14). In the last municipal election, 122 votes were cast (TR. 642-43). The mayor and town council members work part-time; they all have other jobs (TR. 649-50). Bluffton has three full-time policemen with a chief of police (Plantation Ex. 6 at 14). Bluffton is also policed by the Beaufort County Sheriff's Department from that department's office on Hilton Head. The town and the surrounding area have an all-volunteer fire

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[5] Some of the "Bluffton" commercial establishments listed by Plantation are located outside Bluffton or are no longer operating. For example, the oyster and crab processing factory is in receivership and is no longer operating (TR. 503-04). The Deer Tongue Warehouse and Margaritaville Quarter Horses and Stables have moved out of Bluffton (TR. 612, 619). Pinckney Electrical Company, Helmly Insurance Agency, Farm Bureau Insurance Services, Insurance Services of Bluffton, Eppling Masonry, Inc., Daly's Garage and Wrecker Service, T.W. Burrow, Realtor, Buck Island Nursery, Bragg's Construction Company and The Flower Basket are all located outside Bluffton (TR. 620-21). Bluffton Cablevision, Inc. is not yet operating (TR. 621). Palmetto Place and the Bluffton Industrial Park are located well outside Bluffton (TR. 622). The land for Palmetto Place was cleared about a year ago but the development is currently on hold. *Id.*

department which maintains an automatic mutual aid agreement with Hilton Head's two fire departments (HHI Joint Ex. 1 at 7).

27. Bluffton has no hospital. Bluffton residents go to Beaufort, Savannah or Hilton Head for hospital care. Emergency vehicles take Bluffton residents to Hilton Head (TR. 633). A doctor and an optometrist work in Bluffton on a part-time basis, less than ten hours per week (TR. 623). Two dentists also have offices in Bluffton (Plantation Ex. 6 at 12).

28. Bluffton is served by the Michael C. Riley Elementary School (Plantation Ex. 6 at 12; TR. 624). Bluffton and Hilton Head students attend the same middle school (located in Bluffton) and the same high school (located in Hilton Head) (TR. 625-26). Six months ago, a library was opened in Bluffton, staffed by volunteers. The library is going to be taken over by Beaufort County (TR. 628). There are approximately six civic and cultural organizations in Bluffton and seven churches (Plantation Ex. 6 at 12 and 13; TR. 469). Bluffton has a post office located on Bridge Street (Plantation Ex. 6, p. 13) and its own independent telephone company, the Bluffton Telephone and Appliance Company, Inc. (Plantation Ex. 6, p. 13).

Contingent Comparative Issue

Santee-Cooper Broadcasting Company of Hilton Head, Inc. (Santee-Cooper)

The Applicant

29. Santee-Cooper is a South Carolina corporation formed for the purpose of constructing and operating a new Class A FM station on Channel 288A (103.5 mHz) at Hilton Head Island. The Corporation has no other business interests and is comprised of two shareholders, both residents of the State of South Carolina. The principals are:

Principals	*Office*	*Interest*
Clarence E. Jones	President Secretary Director	76%
Bobby Nichols	Vice President Director	24%

(Santee-Cooper Ex. 1)

Diversification

30. Santee-Cooper has no interest in any broadcast station, cable television system, newspaper or other media of mass communications. However, Santee-Cooper's President and 76% shareholder, Clarence E. Jones, is the 100% stockholder,[6] President and Director of Santee-Cooper Broadcasting Company of Orangeburg, Inc., licensee of WSOL-AM,

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[6] By Amendment filed March 5, 1984, Santee-Cooper reported that Mr. Jones in his capacity as an individual was now the sole owner and licensee of WSOL-AM.

Elloree, South Carolina.[7] Bobby Nichols, 24% shareholder of Santee-Cooper, has no ownership interest in any media of mass communications (Santee-Cooper Ex. 5, p. 1).

Integration

31. Clarence E. Jones proposes to devote 20 or more hours per week to station operations. Mr. Jones, who is an engineer, will serve as the station's Chief Operator and will be responsible for corporate administration and fiscal management of the licensee (Santee-Cooper Ex. 2, p. 1).

32. Clarence E. Jones was born on January 13, 1932 in Lufkin, Texas. He received a B.S. degree in Speech and Education from Stephen F. Austin State College, Nacogdoches, Texas in 1954. Upon graduation from college, Mr. Jones taught music education for several years in the Texas public school system (Santee-Cooper Ex. 3, p. 1).

33. From 1958 to 1961, Mr. Jones was President and a 50% shareholder of Radio Orangeburg, Inc., licensee of radio station WORG(AM) in Orangeburg, South Carolina. He served as full-time General Manager of the station. Mr. Jones sold his interest in that station in 1961, and attended the University of South Carolina Law School during that year (Santee-Cooper Ex. 3, p. 1).

34. In 1962, Mr. Jones returned to broadcasting as the President and 100% owner of Soundameria Corp., licensee of radio station WQIZ(AM), and later WQIZ-FM (now WDWQ-FM), licensed to serve St. George, South Carolina. Mr. Jones worked as full-time General Manager of WQIZ(AM). He sold his interest in these stations in 1979 (Santee-Cooper Ex. 3, p. 1).

35. From 1979 to the present, Mr. Jones has been the President and 100% shareholder of Santee-Cooper Broadcasting Company of Orangeburg, Inc. Santee-Cooper Broadcasting Company of Orangeburg, Inc. received a construction permit for a new AM station to serve Elloree-Santee, South Carolina in 1981, and is presently the licensee of radio station WSOL(AM) serving Elloree-Santee (Santee-Cooper Ex. 3, p. 2). WSOL(AM) is a daytime-only AM radio station. It is located about a two hour drive by car north from Hilton Head (TR. 81, 92).

36. In addition to his broadcasting experience, Mr. Jones has also had experience in the broadcast equipment field stemming in part from his position as President and 100% shareholder of American Electronic, Inc., a South Carolina corporation which was involved in the manufacture and

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[7] In addition to his existing broadcast interest, Clarence E. Jones is sole owner of Santee-Cooper Broadcasting Company of Augusta, Georgia, FCC File No. BPH-820622AE, applicant for a construction permit for an FM station in Augusta, Georgia. This application was designated for hearing on October 7, 1983. Mr. Jones is proposed as the Chief Operator of this station and his duties will be the same as proposed for the Hilton Head station (TR. 85). Augusta is an hour and a half drive west of Hilton Head (TR. 92-93).

distribution of remote broadcast units. Mr. Jones dissolved this corporation in 1979 (Santee-Cooper Ex. 3, p. 2).

37. Mr. Jones presently resides in Eutawville, South Carolina, but will relocate to Hilton Head Island, where he owns property, in the event Santee-Cooper is awarded a construction permit (Santee-Cooper Ex. 3, p. 2; TR. 86). Mr. Jones has resided in Eutawville for the past three or four years. Prior to that time, he lived in St. George, South Carolina for approximately 18 years (TR. 86).

38. Mr. Nichols is proposed as the station's full-time General Manager (minimum of 40 hours per week). Mr. Nichols will be responsible for the day-to-day operations of the station including the establishment and administration of the station's policies relating to hiring, programming and sales; payroll planning and execution; supervision of employees; and monitoring and scheduling of the station's programming (Santee-Cooper Ex. 2, p. 1).

39. Bobby Nichols was born in St. Matthews, South Carolina on July 19, 1946. He graduated from South Carolina State College in 1969, receiving a Bachelor of Arts in social studies, with a major in economics. Mr. Nichols received a Master of Arts degree in education from South Carolina State College in 1973.

40. Mr. Nichols, who is black, has been involved in various broadcast stations in South Carolina since 1972. In 1972, Mr. Nichols was employed as a part-time sales person at WDIX(AM)-FM, Orangeburg, South Carolina. Over the next two years, Mr. Nichols worked his way up to the position of full-time sales person and announcer (Santee-Cooper Ex. 4, p. 1).

41. From 1975 to 1979, Mr. Nichols was employed as a full-time salesman and announcer at WQIZ-AM/FM, serving St. George, South Carolina. From 1979 to March 1980, Mr. Nichols held the same position for WQIZ-FM exclusively (Santee-Cooper Ex. 4, p. 1).

42. In March, 1980, Mr. Nichols became the Assistant General Manager of radio station WJBW-FM in Hampton, South Carolina, a position which he held until November of 1981. He was also a salesperson and announcer during this time. In December, 1981, he became the General Manager of WSOL(AM), serving Elloree-Santee, South Carolina (Santee-Cooper Ex. 4, p. 1).

43. Mr. Nichols terminated his employment at WSOL(AM) in March of 1982. He is presently employed as the Sales Manager at radio station WBAW(AM)-FM, in Barnwell, South Carolina, and has held this position since May, 1982 (Santee-Cooper Ex. 4, p. 1).

44. Mr. Nichols will terminate his employment at WBAW(AM)-FM and move to Hilton Head to assume his full-time duties upon grant of the

Santee-Cooper application (Santee-Cooper Ex. 2, p. 1). He presently resides in Orangeburg, South Carolina.

Women's Broadcasting Coalition, Inc. (WBC)

The Applicant

45. Women's Broadcasting Coalition, Inc. is a corporation organized under the laws of the State of South Carolina. WBC was created for the purpose of applying for and operating a new FM radio station on Hilton Head Island, South Carolina. The corporation has no other business interests. The officers, directors and stock subscribers of the corporation are:

Engle C. Harvey 197 Sunset Circle Hardeeville, SC 29927	President, Director, 33 1/3% subscriber
Yvonne Harvey Beach Highway S-94 Hardeeville, SC 29927	Vice President, Director, 33 1/3% subscriber
Sybil Smith Harvey Heyward Street Hardeeville, SC 29927	Secretary-Treasurer, Director, 33 1/3% subscriber

(WBC Ex. 1, p. 1; TR. 104)

46. Engle C. Harvey is the mother of Yvonne Harvey Beach and the mother-in-law of Sybil Smith Harvey (WBC Ex. 1, p. 1).

Diversification

47. WBC has no ownership interest in any medium of mass communications. However, Engle C. Harvey, her husband Leroy Harvey, Jr., Yvonne Harvey Beach, Leroy Harvey III (husband of Sybil Smith Harvey) and other members of their family are the sole owners of the Hargray Telephone Company (TR. 349). The Hargray Telephone Company provides telephone service to Hilton Head Island (TR. 132). Hardeeville, and Daufuskie Island, South Carolina (TR. 136). The Hargray Telephone Company also provides feeds to the local radio stations (TR. 236).

48. There are 350 shares of stock of the Hargray Telephone Company outstanding with the ownership as follows: (TR. 349-50).

Gertrude G. Harvey Trust	70 shares
Getrude G. Harvey	60 shares
Leroy Harvey, Jr.	75 shares
Gloria Shepard	75 shares
H&S Investors	70 shares
Total:	350 shares

49. The beneficiaries of the Gertrude G. Harvey Trust, which was established on October 15, 1979 and to which the Hargray Telephone Company stock was transferred on the same date, are (TR. 349-50):

Gloria Harvey Shepard
Leroy Everett Harvey, Jr.
Ray L. Shepard (deceased)
Michael Ray Shepard
Glynn Eric Shepard
Engle Mae Harvey
Leroy Everett Harvey, III
Ronald Edward Harvey
Engle Yvonne Harvey Beach
Randall Gray Harvey
Cynthia Ann Harvey

The same individuals are principals in H&S Investors (TR. 350).

50. Engle Harvey and Yvonne Harvey Beach, principals of WBC, are beneficiaries of the Gertrude G. Harvey Trust, which owns 20% of Hargray Telephone Company, and each has a limited partnership interest in H&S Investors, which owns an additional 20% of the telephone company (TR. 350). In addition, Leroy Harvey III, husband of Sybil Smith Harvey, a principal of WBC, is a beneficiary of the Gertrude Harvey Trust and a limited partner in H&S Investors (TR. 350). Leroy Harvey, Jr., husband of Engle Harvey, a WBC principal, and father of Yvonne Harvey Beach, also owns 21.4% of Hargray Telephone Company in addition to his beneficial interest in the Gertrude Harvey Trust and his general partnership interest in H&S Investors (TR. 348-50).

51. Leroy E. Harvey, III, Ronald E. Harvey, Yvonne Harvey Beach, Randall Gray Harvey and Cynthia Ann Harvey are brothers and sisters; Leroy Harvey, Jr. and Engle Harvey are their father and mother; Gloria Harvey Shepard is their aunt; Ray L. Shepard, who is deceased, was their uncle and husband of Gloria Harvey Shepard; and Michael Ray Shepard and Glynn Eric Shepard are their cousins and the children of Gloria Harvey Shepard (TR. 368).

52. In approximately 1979, the Hargray Telephone Company acquired franchise rights to provide cable television service in Jasper County, Hardeeville, and Ridgeland, South Carolina (TR. 347). In 1982, Hargray Telephone Company assigned these rights to Hargray CATV Company, Inc. (WBC Ex. 4; TR. 347).

53. Hargray CATV Company, Inc. was incorporated in approximately late 1979 by Ray and Gloria Shepard. Each shareholder of Hargray Telephone Company, Inc. was given the opportunity to subscribe to stock in Hargray CATV Company, Inc. On or about March 14, 1983, stock subscriptions in Hargray CATV Company, Inc. were executed (WBC Ex. 4, p. 1). The President, sole Director, and Chief Executive Officer of Hargray CATV Company, Inc. is Gloria H. Shepard.

54. Hargray CATV Company, Inc. commenced providing cable television services in the middle of April, 1983. The subscribers of stock in Hargray CATV Company, Inc. were as follows (WBC Ex. 4, p. 2):

Subscriber	*Number of Shares of Common Stock*
Gloria H. Shepard	14,000
Leroy Everett Harvey, Jr.	8,000
Ray L. Shepard	14,000
Michael Ray Shepard	14,000
Glynn Eric Shepard	14,000
Engle Mae Harvey	8,000
Leroy Everett Harvey, III	8,000
Ronald Edward Harvey	8,000
Engle Yvonne Harvey Beach	8,000
Randall Gray Harvey	8,000
Cynthia Ann Harvey	8,000

It was initially contemplated that each shareholder would be required to pay in his or her capital shortly after the time of the subscription; however, no capital contributions have been made, none of the subscriptions have been called, and no stock has been issued in or by the company. The company has been financed entirely from the proceeds of a bank loan which is guaranteed through the pledge of Hargray CATV Company, Inc. assets and stock when issued and 70 shares of Hargray Telephone Company, Inc. stock owned by H&S Investors, a private investment partnership (WBC Ex. 4, pp. 2-3).

55. Hargray CATV Company, Inc. presently provides cable television service to approximately 540 subscribers in Hardeeville, 300 subscribers in Ridgeland, and 135 subscribers in Estill, South Carolina. Among the subscribers to the cable service in Hardeeville are Engle C. Harvey and Sybil Smith Harvey. They do not pay for the service. Hardeeville is located 20 miles from Hilton Head, Ridgeland is located 35 miles from Hilton Head, and Estill is located 65 miles from Hilton Head. The system passes some 3,400 homes, but the maximum number of subscribers expected to be served by the system is approximately 1600-1700 (WBC Ex. 4, p. 3; TR. 370). Leroy Harvey III, husband of Sybil Smith Harvey, is employed in an executive capacity with both Hargray Telephone Company and the Hargray CATV Company, Inc. (TR. 383-84). He gets paid only by the telephone company and does not know whether the CATV Company reimburses the telephone company for his time (TR. 365-66). Mr. Harvey recommends to his aunt what signals should be carried on the cable system although she has the final word (TR. 379).

56. In an Amendment to its application filed on December 30, 1983, WBC reported that Engle Harvey, Yvonne Beach, Leroy Harvey, Jr. and Leroy Harvey, III, each terminated any and all right to subscribe to stock in Hargray CATV Company, Inc. The amendment was accepted for reporting purposes by Order of the Presiding Judge released January 26, 1984.

57. Ronald Harvey (son of Engle C. Harvey, brother of Yvonne Harvey Beach and brother-in-law of Sybil Smith Harvey) owns 80% of Edisto Beach Cable TV, Inc. A June 17, 1983 amendment to the WBC application reported that the company operates a cable television system in Edisto Beach, South Carolina which is located approximately 65 miles from Hilton Head. The system eventually plans to serve 600 subscribers, and presently serves approximately 210 subscribers. The amendment also indicates that Ronald's interest was purchased on November 9, 1982 with the proceeds of a loan co-signed by Ronald and his four siblings (Leroy III, Randall, Yvonne and Cindy) (WBC Ex. 2, p. 1; TR. 376, 965). At the time the note was signed, there was an oral understanding that convertible debentures in the company would be issued to Ronald's siblings in return for their co-signing the note (TR. 239). However, no convertible debentures were ever issued and none are contemplated (TR. 374-75, 377, 378). Leroy III, Randall, Yvonne and Cindy have no interest in Edisto Beach Cable TV, Inc.

Integration

58. Engle C. Harvey, a female, is President, Director and a 33⅓% stock subscriber of WBC. Should WBC be awarded a construction permit, she will work full time, a minimum of forty hours per week, as President and General Manager of the station. Engle Harvey will be responsible for the overall operation of the station and will supervise the implementation of station policies established by the Directors. She will also be responsible for implementation of the station's Equal Employment Opportunity Program (WBC Ex. 3, p. 3).

59. Engle Harvey was born and resides in Hardeeville, South Carolina (WBC Ex. 3, p. 1). Hardeeville, South Carolina is approximately 35 miles from Hilton Head (TR. 136). She will not move to Hilton Head Island. She no longer drives a car and will rely on relatives or a carpool to drive her to work (TR. 326). Engle Harvey has no prior broadcast or managerial experience and has never been employed (TR. 307). She visited a radio station on one occasion (TR. 319).

60. Engle Harvey is a member of the Eastern Star Lodge and the Ladies' Auxiliary of the Marine Rescue Squadron (WBC Ex. 3). The Eastern Star Lodge is involved in raising funds for charitable purposes throughout the proposed service area. *Id.*; TR. 212. The Ladies' Auxiliary of the Marine Rescue Squadron assists the Rescue Squadron on their rescue missions (TR. 188-89). Some members of both organizations reside on Hilton Head Island (WBC Ex. 3; TR. 130, 403).

61. Yvonne Harvey Beach, a female, is Vice President, Director and a 33⅓% stock subscriber of WBC. Should WBC be awarded a construction permit, she will work a minimum of forty hours per week at the new station as Sales Manager and will reside on Hilton Head Island, South

Carolina (WBC Ex. 3, p. 3). As Sales Manager, Yvonne Beach will be responsible for the day-to-day direction and management of the station's sales efforts and its contacts with the service area's business community (WBC Ex. 3, p. 5).

62. Yvonne Beach was born in Savannah, Georgia and lives in Hardeeville, South Carolina. She is a member of the Hilton Head Chamber of Commerce, but attends only one meeting a year (TR. 188). She is a member of the same organizations as her mother.

63. Yvonne Beach has been employed by Hargray Telephone Company, Inc. as a Commercial Representative since 1975, working in the company's Hardeeville and Hilton Head Island offices. She is now Officer Manager of the Hardeeville office (WBC Ex. 3 pp. 3-4). According to Yvonne Beach, the telephone company sells advertising in its yellow pages through an independent contractor and such activity would compete with a Hilton Head radio station (TR. 183, 184).

64. Sybil Smith Harvey, a female, is Secretary and Treasurer, Director and a 33⅓% stock subscriber of WBC. Should WBC be awarded a construction permit, she will work full time, a minimum of forty hours per week, as the new station's Operations Manager (WBC Ex. 3, p. 5). As Operations Manager, Sybil Harvey will be responsible for the day-to-day general administration of the station, including matters related to personnel, accounting and budget (WBC Ex. 3, p. 7).

65. Sybil Harvey was born in Ridgeland, South Carolina and currently lives in Hardeeville, South Carolina (WBC Ex. 3, p. 5). She does not propose to move to Hilton Head, but will commute from Hardeeville (TR. 228).

66. She received an Associate of Science degree in 1973 from the Medical University of South Carolina in Charleston, South Carolina and for the next four years, she was employed as a dental assistant. In January, 1979, she began to work at the Hilton Head Island office of Hargray Telephone Company, Inc. as an Engineering Clerk, holding that position from January, 1979, until July, 1980 and from April, 1981 until September, 1981. For approximately five months in 1980, she was the plant secretary for Hargray Telephone Company, Inc. (WBC Ex. 3, pp. 5-6). She is not now employed, and has two sons (TR. 228). They are 2 and 5 years of age (TR. 246). She will use day care for her children while at work.

Auxiliary Power

67. WBC has proposed auxiliary power units at both the studio and transmitter sites for emergencies and civil defense (WBC Ex. 8).

Heritage Broadcasting Corporation (Heritage)

The Applicant

68. Heritage Broadcasting Corporation is a South Carolina corporation organized to obtain authorization from the Federal Communications Commission to construct and operate an FM broadcast station on FM Channel 288A at Hilton Head Island, South Carolina. Its principals are (HBC Ex. 1, p. 1):

Stockholder	*Position*	*Percentage of Voting Stock*
Martha A. Marshall	President/Director	45%
Robert A. Marshall	Vice President/Director	45%
LeRoy Durant	Vice President/Director	5%
Alberta Durant	Secretary/Treasurer	5%

Diversification

69. Robert A. Marshall is a Vice President, Director and 19% owner of KPLT, Inc., licensee of KPLT(AM) and KTXU(FM) in Paris, Texas. KPLT, Inc. also owns 100% of the stock of Gamecock City Broadcasting, Inc., licensee of WFIG(AM) and WWDM(FM) in Sumter, South Carolina (HBC Ex. 1).[8] Sumter is approximately 120 air miles from Heritage's proposed transmitter site on Hilton Head Island. Mr. Marshall is Vice President and Director and LeRoy Durant, also a Heritage principal, is a Director of Gamecock City Broadcasting, Inc. (HBC Ex. 1). Since 1966, Mr. Marshall has spent three to five hours a week working for WFIG(AM)/ WWDM(FM) in a legal capacity (HBC Ex. 3). He plans to continue that work (TR. 417). Mr. Marshall does not participate in the day-to-day activities of any of the above stations (TR. 428-29).

70. Mr. Marshall owns jointly with his wife, Martha A. Marshall, .5% of the stock of Thrash Broadcasting Company, which owns 84% of the voting stock of Lubbock Broadcasting Co., the licensee of radio broadcast stations KEND and KLLL-FM, Lubbock, Texas and 93% of the voting stock of El Paso County Broadcasting Co., Inc., the licensee of radio broadcast stations KAMA and KAMZ-FM, El Paso, Texas. Mr. Marshall is a Vice President and Director of Thrash Broadcasting Company (HBC Ex. 1, p. 2).

71. There are three radio stations and one television station licensed to Paris, Texas. Five radio stations and one television station are licensed to Sumter, South Carolina; fifteen radio broadcast stations and five televi-

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[8] At the time of the hearing, KPLT, Inc. owned 90% of Gamecock City Broadcasting, Inc. This interest was increased to 100% and reported in an amendment filed by Heritage on January 17, 1984.

sion stations are licensed to Lubbock, Texas, and eighteen radio stations and six television stations are licensed to El Paso, Texas.

72. Mrs. Durant has no broadcast or media ownership interest (HBC Ex. 5).

Integration

73. Martha A. Marshall, born December 29, 1943 in San Diego, California, has been a resident of Hilton Head Island, South Carolina since September, 1981. She is President and a Director of Heritage and has subscribed to 45% of the company's stock.

74. Should Heritage be awarded a construction permit to operate an FM broadcast station on Channel 288A at Hilton Head Island, Mrs. Marshall will be employed full time as General Manager of the proposed station for forty or more hours each week. She will have overall responsibility for the day-to-day affairs of the station, including the implementation of station policies.

75. Since 1981, Mrs. Marshall has been Vice President and Secretary-Treasurer of R.A. Marshall & Company, Hilton Head Island, a firm engaged in media investment analysis and brokerage. From 1980 to 1981, she was Secretary of the Twelfth Shelf Corporation d/b/a The Sailing Experience, Hilton Head Island, a charter boat service. From 1974 to 1980, Mrs. Marshall was an intermediate or elementary school counselor in the El Paso, Texas Public School System, prior to which she was a full-time English teacher in the El Paso Public School System from 1966 to 1974.

76. From approximately 1973 to 1980, she also worked part-time, approximately ten hours per week, at radio stations KAMA-AM and FM, El Paso, Texas, performing secretarial work, writing copy and assisting in the production of advertising commercials (TR. 454, 458). She also performed part-time secretarial work at Broadcast Services, Inc., El Paso, Texas, a sales representative firm, from 1958 to 1961. During 1964 and 1965, while a student at the University of Southern California, she performed secretarial services, part-time, at radio broadcast stations KGBS, Los Angeles, California (HBC Ex. 2, p. 1, TR. 458).

77. Mrs. Marshall has been active in the following Hilton Head Island civic or professional organizations. She has been a member of the Hilton Head Island Chamber of Commerce since February, 1982, a member of the H.E. McCracken High School Parent-Teachers Association since September, 1981, and a member of the St. Andrews By-the-Sea Methodist Church since the spring of 1982. She was a member of the Hilton Head Island Historical Society from January, 1982 to January, 1983 and a member of Zonta International, a women's service club on Hilton Head Island during 1982 and 1983.

78. Mrs. Marshall graduated from the University of Southern California in 1966, receiving a Bachelor of Arts degree in English. In 1972, she

received a Masters of Education degree in Guidance and Counseling from the University of Texas at El Paso (HBC Ex. 2, p. 2).

79. Robert A. Marshall, born December 28, 1941, in Des Moines, Iowa, has been a resident of Hilton Head Island, South Carolina, since September, 1981. He is the husband of Martha A. Marshall. Mr. Marshall, as noted, is Vice President and a Director of Heritage and has subscribed to 45% of the company's stock (HBC Ex. 1, pp. 1-2).

80. Should Heritage be awarded a construction permit for an FM station at Hilton Head Island, Mr. Marshall will be employed full time as Sales Manager of the proposed station for forty or more hours each week and will relinquish the full-time management of R.A. Marshall & Company, a firm engaged in media investment analysis and brokerage. As Sales Manager of the proposed station, he will supervise the station's sales department and sales operation and staff.

81. For the past two years, Mr. Marshall has been employed full time as President of R.A. Marshall & Company, Hilton Head Island, a firm engaged in media investment analysis and brokerage, and which he owns jointly with his wife (TR. 434). For the fifteen years prior to this position, he was employed full time as Associate Broker and Vice President of Blackburn & Company of Georgia, Inc., Atlanta, Georgia, a media brokerage firm.

82. While in college at Emory University, he worked full time during the summer months from 1960 to 1964 at standard broadcast station KPLT, Paris, Texas. He was engaged in on-air work and news coverage and sold advertising (TR. 422). He ended his employment to return to school in the fall (HBC Ex. 3, p. 1).

83. During 1962 and 1963, while at Emory University, Mr. Marshall worked approximately forty hours per week in the news department at standard broadcast station WQXI, Atlanta, Georgia, as an editor, supervising three to four employees (TR. 421). He also worked part-time in the news department on Sundays prior to being employed full time. He ended his employment to go to law school.

84. While in law school, Mr. Marshall worked part time in 1965 at radio broadcast station WYNX, Smyrna, Georgia, approximately 10 to 15 hours each week as a week-end announcer. He ended this employment to complete his law school education at Emory University Law School.

85. Since 1966, he has worked part-time, approximately three to five hours per week, in a legal capacity for radio broadcast stations WFIG and WWDM(FM) in Sumter, South Carolina.

86. In order to maintain full time employment at Heritage's proposed new radio station, Mr. Marshall will make arrangements for the full-time management of R.A. Marshall & Company. He will spend a minimal amount of time in overseeing various investments, will continue to

represent Gamecock City Broadcasting Co., the licensee of radio stations WFIG and WWDM(FM) in various legal matters and will spend approximately ten hours per month overseeing The Sailing Experience, a small charter boat business at Hilton Head Island.

87. Mr. Marshall is a 50% partner with his brother in a ranch in Paris, Texas. This requires a minimal amount of monthly activity, primarily review of correspondence and financial data.

88. Mr. Marshall has been active in the following local Hilton Head Island civic or professional organizations. He has been a member of the H.E. McCracken High School Parent-Teachers Association since September, 1981 and a member of the Hilton Head Island Chamber of Commerce since February, 1982. He was a member of the Hilton Head Island Historical Society during 1982 and 1983 (HBC Ex. 3, p. 2).

89. LeRoy Durant, born January 10, 1944, in Florence, South Carolina, has been a resident of Florence, South Carolina since 1944. He is a Vice President and Director of Heritage and has subscribed to 5% of the company's stock.

90. Mr. Durant served in the U.S. Army - Airborne, primarily in Vietnam from 1964 to 1970 and received the Bronze Star with V for Valor, an Army Commendation with V for Valor, an Army Commendation Award, a Meritorious Unit Citation and the Purple Heart (HBC Ex. 4, p. 2).

91. Since June, 1972, Mr. Durant has been the full-time Station Manager of FM broadcast station WWDM, Sumter, South Carolina, (HBC Ex. 4, p. 1; TR. 664). Mr. Durant, as previously noted, is a Director of Gamecock City Broadcasting, Inc., the licensee of radio stations WFIG and WWDM(FM), Sumter, South Carolina (HBC Ex. 1, p. 1). In the event Heritage is awarded a construction permit to operate an FM broadcast station on Channel 288A at Hilton Head, Mr. Durant will reside at Hilton Head Island and will be employed full time as Station Manager of the proposed station for forty or more hours each week. As Station Manager, he will monitor the station's day-to-day operation, supervising the station's programming, technical, maintenance, security and equal employment opportunity functions (HBC Ex. 4, p. 1).

92. Prior to assuming his duties at WWDM(FM) in Sumter, from June, 1970, to May, 1972, he was Director in the production department of television station WBTW, Channel 15, Florence, South Carolina (TR. 676).

93. Alberta Durant, born August 15, 1946, in Florence, South Carolina has been a resident of Florence since 1946, and is the wife of LeRoy Durant, an officer, Director and stock subscriber of Heritage. Mr. and Mrs. Durant are black Americans. She is Secretary-Treasurer of Heritage and has subscribed to 5% of the company's stock.

94. In the event Heritage is awarded a construction permit to operate an FM broadcast station at Hilton Head Island, South Carolina, Mrs. Durant will reside at Hilton Head Island and will be employed full time as the Business Manager of the proposed station for forty or more hours each week. As Business Manager, she will supervise clerical office personnel including the traffic manager and receptionist.

95. Mrs. Durant has been employed as a bookkeeper for the Florence County Community Action Agency for approximately fifteen years. As bookkeeper for the Florence County Community Action Agency, Mrs. Durant supervises five bookkeepers, one payroll clerk and an annual gross payroll of over one million dollars (TR. 690).

96. Mrs. Durant has had two years of business education at Carolina College of Commerce and took advanced accounting courses (TR. 693).

97. Heritage has proposed use of auxiliary power to provide emergency power to their radio operation (HBC Ex. 1, p. 2).

Jesse N. Williams, Jr. (Williams)

The Applicant

98. Jesse N. Williams, Jr. is an individual applicant for the proposed station. He is a black American. He presently resides in Charleston, South Carolina, located approximately 55 miles from Hilton Head (Williams Ex.1).

Diversification

99. Mr. Williams' testimony did not indicate any ownership interests in any medium of mass communications. To clarify the matter Williams, pursuant to an Order of the Presiding Judge, submitted an affidavit stating that "neither I nor my wife have any interest in or control of any medium of mass communications".

Integration

100. Upon grant of his application, Williams will move to Hilton Head Island, where he will devote his full time to the construction and later operation of the radio station. He will act as the station's Manager, supervising all phases of station operation. He will devote a minimum of 40 hours per week to the station.

101. Williams was born in Charleston, South Carolina on August 6, 1931, graduated from the B.C.A. School of Broadcasting, New York City, in 1960, and graduated from Trident Technical College in 1975 with an Associate Degree in Criminal Justice. He is employed as Chief Investigator of the Public Defender's Corp. of Charleston County, South Carolina (Williams Ex. 1).

102. In 1975, Mr. Williams became employed as a part-time announcer for standard broadcast station WPAL, Charleston, South Carolina, a

position which he held until 1981 when he worked part-time for radio station WWWZ approximately thirty miles from Charleston. At WPAL, he was the announcer for a morning one-hour program with a gospel format which was usually recorded by him. At WWWZ, he worked on a weekly Sunday night gospel program (TR, 706). Later in 1981, he began working as a part-time announcer for radio station WKCN, Charleston (TR. 705-07). At WCKN, he is the announcer for a Sunday gospel show (TR. 707, 710).

103. Williams has also worked as a gospel concert promoter for the past eight years (TR. 749). He works part-time as a promoter, contacting gospel groups, setting up the dates, and promoting the concerts through radio stations and television stations (TR. 724). He promotes approximately four concerts a year taking in average gross receipts of $40,000 to $50,000 annually (TR. 757, 760). Williams "splits the gate" with churches that help him promote the concerts (TR. 759).

104. Williams promotes his gospel concerts on his WKCN Sunday morning gospel program (TR. 751). These are paid announcements prepared and broadcast by the station (TR. 808). In addition, Williams, on occasion, when signing off, would say something to the effect that "The concert is tonight. Don't forget. I will see you there. Something like that" (TR. 805-06). This type statement was made in addition to the paid commercial announcements broadcast during the program.

Plantation Broadcasting Corporation (Plantation)

The Applicant

105. Plantation is a South Carolina corporation created for the purpose of applying for and operating an FM radio station in Bluffton. Gilda Wright Smithwick, a female, is President, Treasurer, sole Director and 100% owner of Plantation (Plantation Ex. 1).

Diversification

106. Gilda Wright Smithwick has no ownership interest or office with any radio and/or television station, newspaper, cable television system, or other media of mass communications in Bluffton, South Carolina, or elsewhere. However, Gary S. Smithwick, Ms. Smithwick's husband, is President, Treasurer, Director and 30% owner of Consolidated Broadcasting Corporation, permittee of WLXI-TV in Greensboro, North Carolina.[9] (Plantation Ex. 7). Greensboro, North Carolina is approximately 275.8 air miles (350 road miles) from Plantation's proposed transmitter site (Plantation Ex. 3). The 1 mV/m contour of Plantation's station and the

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[9] Plantation amended its application to show that Mr. Smithwick had reduced his ownership interest in Consolidated Broadcasting Corporation to 25.5%. Since this occurred after the "B" cut-off date, it will not be considered.

Grade B contour of WLXI-TV are separated by more than 200 miles. WLXI-TV will not sell advertising to or serve clients in the Bluffton, South Carolina area. Conversely, the Bluffton radio station will not sell advertising to or serve clients in the Greensboro, North Carolina area. There will be no potential conflict of interest between the two operations (Plantation Ex. 3, p. 2). On February 16, 1983, Mr. Smithwick was elected Assistant Secretary of Rawley Communications Corporation, licensee of WJYR(FM) in Myrtle Beach, South Carolina and WJYW(FM) (formerly WLCF(FM)) in Southport, North Carolina (TR. 979-80); Plantation Amendment, filed March 16, 1983). Smithwick was made an officer as an accommodation and he only performed one act, that is, countersigning an agreement (See Order of the Presiding Judge, FCC 83M-2081, released June 24, 1983). Myrtle Beach, South Carolina is approximately 150 air miles and Southport, North Carolina is approximately 300 air miles from Plantation's proposed transmitter site. Mr. Smithwick resigned that position on April 1, 1983 (See Order of the Presiding Judge, FCC 83M-2081, released June 24, 1983).

Integration

107. Gilda Wright Smithwick, who presently resides in Winston-Salem, North Carolina, proposes to be employed full time (a minimum of 40 hours per week) in the day-to-day operation of the station, as General Manager (Plantation Exs. 4 & 2). Gilda Wright Smithwick will resign any other employment she may have, and sever any conflicting responsibilities, upon final grant of the Plantation application and then devote herself full time to construction and operation of the station (Plantation Ex. 4). She plans to move to Bluffton if Plantation is awarded the construction permit for the station (TR. 954).

108. In 1968, Ms. Smithwick was employed for two to three months by WSJS(TV) as a secretary, with clerical duties only (Plantation Ex. 2; TR. 823). Between April, 1982 and February, 1983, Ms. Smithwick intermittently worked for approximately six weeks as a sales person trainee for WJYR(FM) in Myrtle Beach, South Carolina (TR. 829, 930-33). She did not receive a salary (TR. 934). She also spent one week in June, 1983 as a sales person for WJYW(FM) in Southport, North Carolina (TR. 936). When she was at the stations, she was provided lodging on the beach, which she considers her compensation, and her family often joined her there for vacations (TR. 931-32, 936, 939). Mr. Smithwick, an attorney, provides legal representation for both WJYR(FM) and WJYW(FM) (TR. 827).

109. Plantation has proposed to purchase and install an auxiliary power generator at its proposed radio station (Plantation Ex. 5).

Reginald Taylor and G. Troy Mattox d/b/a Calibogue Sound (Calibogue Sound)

The Applicant

110. Calibogue Sound is a Georgia partnership owned in equal shares by two general partners, G. Troy Mattox and Reginald Taylor (Calibogue Sound Exs. 1 and 2).

Diversification

111. Calibogue Sound holds no interest in other media of mass communications. Neither does Reginald Taylor. However, Mr. Mattox is an officer, Director, General Manager and 50% shareholder of Mattox/Guest Broadcasting Corporation, licensee of radio station WKUB(FM) in Blackshear, Georgia. He will continue as officer, Director and owner of Mattox/Guest Broadcasting Corporation, but will terminate his commitment as General Manager (Calibogue Sound Ex. 1). Blackshear is approximately 100 air miles from Calibogue Sound's proposed transmitter site on Hilton Head Island.

Integration

112. Mr. Mattox is proposed to work full time at the station as General Manager. Mr. Taylor is proposed to work at the station 25 hours a month from September through May and full time in June, July and August. Mr. Taylor will work in programming and sales[10] (Calibogue Sound Ex. 4). Mr. Taylor expects that his duties will include selling advertising and announcing on the air.

113. Mr. Mattox has lived in Blackshear, Georgia most of his life. From 1962 until 1966 and from 1968 until 1971, he was a radio announcer at radio station WBSG(AM) in Blackshear. From 1971 through 1975, he was Station Manager there. Since December, 1979, Mr. Mattox has been an Officer, Director and 50% owner of Mattox/Guest Broadcasting Corporation, licensee of radio station WKUB(FM) in Blackshear. He is currently the General Manager of that station but he plans to leave that job and move to Hilton Head if Calibogue Sound is awarded the construction permit in this proceeding (Calibogue Sound Ex. 1). Station WKUB(FM) has seven full-time employees and approximately two to three part-time employees (TR. 1115). Mr. Mattox believes that he presently has adequate personnel at station WKUB(FM) who would be able to take his place (TR. 1118-19).

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[10] Calibogue Sound claimed that Mr. Taylor would be integrated full time, as Station Manager in Calibogue Ex. 2. However, during the hearing the Presiding Judge struck that testimony and ruled that Calibogue Sound would be limited to the integration proposal specified in its application, as shown above (TR. 1135).

114. Mr. Mattox has completed 2½ years of college, attending the University of Georgia off-campus center in Waycross, Georgia in the evening while he was employed full time (1968-1975), taking primarily business courses. Mr. Mattox is a former elected member of the Pierce County Board of Commissioners in Pierce County Georgia (elected 1978; served 1979-1982).

115. Mr. Taylor has been a resident of Blackshear for the past 22 years where he has been employed as a teacher and guidance counselor in the Pierce County School System (Calibogue Sound Ex. 2). He has never worked at a radio station (TR. 1138). Mr. Taylor is black (Calibogue Sound Ex. 2). He is presently an elected member of the city council in Blackshear and has been involved in various service organizations and church activities in Blackshear for over 20 years (Calibogue Sound Ex. 2, pp. 2-3). He has received numerous awards including Outstanding Citizen of the Year (1982), Outstanding Teacher of the Year (1965) and Father of the Year (1980) by his church. *Id.* Mr. Taylor plans to terminate his full time employment as a high school guidance counselor in Blackshear and will resign from the city council and relocate to Hilton Head Island (Calibogue Sound Ex. 2, pp. 3-4). He will continue his part-time Amway distribution business (approximately two to three hours per week) upon relocating to Hilton Head Island.

116. Mr. Taylor holds a Bachelor of Science degree in political science from Florida A&M University in Tallahassee (1961), a Masters of Science degree in guidance and counseling from Ft. Valley State College in Ft. Valley, Georgia (1973) and he has completed 35 credit hours toward a Masters degree in Educational Administration at Valdosta State College in Valdosta, Georgia (Calibogue Sound Ex. 2, p. 2).

117. Calibogue Sound proposes to obtain auxiliary power generating equipment to assure the station's ability to continue operation irrespective of power outages or other like emergencies (Calibogue Sound Ex. 3, p. 1).

Ultimate Findings and Conclusions

118. This proceeding now involves six mutually exclusive applicants. Originally, sixteen applications were designated for hearing, but ten have since been dismissed. Of the six remaining applicants, five are for Hilton Head Island, South Carolina, and the other (Plantation) is for Bluffton, South Carolina. Thus, initially a determination must be made under the 307 (b) issue.

307(b) Issue

119. Section 307(b) of the Communications Act requires that the Commission "shall make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each

of the same". In resolving a Section 307(b) issue, the Commission looks to both the needs of the communities for a transmission service and the needs of the population to be served for a reception service. *Congaree Broadcasters, Inc.*, 42 FCC 2d 685, 688 (A.L.J.), *aff'd*, 42 FCC 2d 683 (Rev. Bd. 1973). In *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1982), the Commission listed the following priorities to be used as the decisional bases in FM Section 307(b) cases:

(1) first full-time aural service (*i.e.*, service to "white" areas);

(2) second full-time aural service (*i.e.*, service to "gray" areas);

(3) first local service; and

(4) other public interest matters.

Equal weight is given to priorities (2) and (3). *Id.*

120. None of the applicants will provide service to "white" or "gray" areas. Indeed, when the new station licensed to Port Royal[11] is taken into consideration, all population proposed to be served will receive at least five aural services both day and night. Thus, there is no basis for awarding a preference to any applicant because of service to "white" or "gray" areas, the first two priorities listed by the Commission in its *Revision of FM Assignment Policies and Procedures*, cited *supra*.

121. Co-equal with service to "gray" areas in the Commission's list of priorities is first local service. Here, Bluffton presently has no local service whereas Hilton Head Island has licensed to it an AM and FM station. On this basis, Plantation, the only Bluffton applicant, urges that it is entitled to a 307(b) preference. What Plantation fails to properly consider is the fact that the Commission has assigned Channel 296A to Bluffton, South Carolina. (See *Report & Order*, Mimeo No. 6736, released September 27, 1983). Plantation argues that notwithstanding this allocation, at this time Bluffton has no local service and there is no assurance that anyone will file for the Bluffton assignment. Thus, it is Plantation's position that the Commission's assignment of Channel 296A to Bluffton should not be considered in this proceeding.

122. It must be emphasized that the channel assigned to Bluffton must be used there and cannot be removed to a nearby community. Thus, unlike the prior procedure whereby an FM assignment could be moved to a community within 10 miles of the community of assignment, the assignment made to Bluffton is fixed and cannot be removed from that community.[12] Moreover, two separate groups have pledged to apply for and build a station in Bluffton in the rule making proceeding which

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[11] *Beaufort County Broadcasting Co.*, 54 RR 2d 924 (Rev. Bd. 1983).

[12] Under the former "10-mile" rule, an applicant could proposed to build an FM broadcast station in any unlisted community within ten miles of a community assigned a frequency. 47 C.F.R. § 73.203(b) (1982). However, the Commission eliminated the 10-mile rule in *The*

resulted in the channel being assigned to Bluffton. Under these circumstances, it would be improper to ignore the assignment of Channel 296A to Bluffton in this proceeding. Specifically, under the 307(b) issue, Bluffton must be held to already have one FM station assigned to that community in comparing the relative needs of Hilton Head and Bluffton for the station at issue in this proceeding. Thus, it cannot be said for 307(b) purposes that Bluffton will remain without local service. Therefore, neither applicant is entitled to a preference under the third priority listed by the Commission in *Revision of FM Assignment Policies and Procedures.*

123. Plantation argues that it would be unfair to consider the assignment of Channel 296A to Bluffton and to impose on Plantation "post litigation responsibility" for such assignment. But the Presiding Judge, at the outset of the hearing, urged the applicants, particularly the Bluffton applicants, to reassess their position in this proceeding in view of the recent assignment of Channel 296A to Bluffton.[13] The other two Bluffton applicants elected to dismiss their applications. As an applicant, Plantation has no vested interest in Bluffton being found the preferred 307(b) community. The mandate of 307(b) cannot be compromised by elevating Plantation's private interest over the paramount public interest. Indeed, the private interest of any applicant under 307(b) must be subservient to the public interest in insuring a "fair, efficient, and equitable distribution of radio service. . . . " Thus, Plantation's argument that it has some type of vested interest in having Bluffton found to be the preferred 307(b) community is rejected.

124. None of the applicants are entitled to a preference under the first three priorities established by the Commission in resolving 307 (b) cases. Thus, the fourth priority, other public interest matters, must be considered. Under this, the comparison can take into account the number of local services, the need for or lack of public radio service and other matters such as the relative size of the proposed communities and their growth rate. As noted earlier, there are at least five aural services to all population proposed to be served and accordingly, no preference is warranted based on reception service. Thus, the other factors under the fourth priority must be considered.

125. Hilton Head Island is a rapidly growing community of 11,344. It is the business, employment and tourist center for the entire area. It has 950 business establishments employing more than 12,000 workers. Bluffton, in comparison, has a population of 541 persons. It cannot be considered a growing community. It has only 20 business establishments,

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Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy, 53 RR 2d 681 (1983).

[13] See TR. 49.

employing far less than 100 workers, and the people of Bluffton look to Hilton Head for employment and services.

126. Hilton Head has one FM broadcast radio station and one standard broadcast radio station, both of which are commonly owned. Grant of an application to serve Hilton Head Island will provide this growing community, which has over twenty times the population of Bluffton, with only its second FM local service, its third local aural service overall and, importantly, only its second independent broadcast voice in the community. The choice then is between awarding a third transmission service and first competitive service to Hilton Head Island or assigning a second transmission service to Bluffton.

127. For purposes of making a determination pursuant to the mandate of Section 307(b), the issue is whether a static community of 541 persons should receive its second local FM service or whether a growing community of over 11,000 people should receive its third local service and first competitive voice.[14] Clearly, the award of a third local service to Hilton Head Island will best achieve the objectives of Section 307(b). Having reached this determination, the Plantation application for Bluffton is not entitled to comparative consideration. *WHW Enterprises, Inc.*, 89 FCC 2d 799 (1982).

Comparative Issue

128. The evaluation of mutually exclusive applicants under the comparative issue is governed by the Commission's 1965 Policy Statement on Comparative Broadcast Hearings (Policy Statement), 1 FCC 2d 393 (1965). In its Statement, the Commission indicated that there are two primary objectives toward which the process of comparison should be directed: (1) the best practical service to the public; and (2) a maximum diffusion of control of the media of mass communications.

Diversification

129. In evaluating the significance of media interests under the diversification criteria, media holdings in the proposed community of license will normally be of most importance, followed by other interests in the remainder of the service area, and finally, by interests in the nation generally. *Policy Statement*, at 395. Other important factors to weight are the degree of the applicants' ownership and control in these media, and their significance in terms of size and coverage, and in relationship to other media in their respective areas. The *Policy Statement* also indicated that control of large interests elsewhere in the state or region may outweight control of a small medium of expression (such as a weekly

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[14] Providing a competitive local transmission service is an important consideration. See *Babcom, Inc.*, 27 FCC 2d 437, 438-39 (1971) set aside on other grounds, 31 FCC 2d 425 (1971); *Caprock Radio, Inc.*, 28 RR 2d 240 (1973).

newspaper) in the same community. Significant management positions must also be considered. The media interests of the applicants must be evaluated with the above principles in mind.

130. With the exception of Jesse N. Williams, Jr., all applicants are chargeable in varying degrees with media interests. Santee-Cooper's President, Director and 76% owner, Clarence Jones, is the sole owner of the licensee of WSOL-AM in Elloree-Santee, South Carolina which is located 100 miles from Hilton Head. Heritage's Vice President and 45% owner, Robert A. Marshall, has an interest in two stations in Paris, Texas and two stations in Sumter, South Carolina.[15] He also has, together with his wife, a joint .5% interest in a company (Thrash Broadcasting Company) which owns 84% of the licensee of two stations in Lubbock, Texas and 93% of the licensee of two stations in El Paso, Texas. Mr. Marshall is a Vice President and Director of Thrash Broadcasting Company. Another Heritage principal is also a Director of the licensee of the two Sumter stations. Calibogue Sound's 50% partner is an officer, Director, General Manager and 50% shareholder of Mattox Guest Broadcasting Corporation, licensee of WKUB(FM) in Blackshear, Georgia, which is located about 100 miles from Hilton Head.

131. The media interests of the foregoing applicants are rather straightforward. However, the applicants are in disagreement regarding WBC's standing under the diversification criteria. This has arisen because of certain interests, held by WBC's principals, their spouses, and other members of their families in the Hargray Telephone Company, the Hargray CATV Company, and the Edisto Beach Cable TV Company.

132. The Edisto Beach Cable TV Company is 80% owned by Ronald Harvey.[16] His interest in the system was purchased with a loan co-signed by Ronald Harvey's two brothers and two sisters. As an inducement for co-signing the loan, an oral understanding was reached that convertible debentures would be issued to the four siblings. No debentures were ever issued and there is no plan to issue any.

133. WBC argues that it should not be charged, for comparative purposes, with an interest in the Edisto Beach Cable TV Company because no convertible debentures were ever issued. Moreover, WBC argues that convertible debentures, even if they were issued, should not be considered because they are not recognized as a present media interest. The cases relied upon by WBC, however, relate to the multiple ownership rules and are not applicable to comparative broadcast cases. Here, there appears to have been an understanding to issue convertible debentures, which if issued, would have given Yvonne Beach and Sybil Harvey (through her

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[15] Marshall is a Vice President and Director of the licensee of the Sumter stations.

[16] Ronald Harvey is the son of Engle Harvey, the brother of Yvonne Beach, and the brother-in-law of Sybil Harvey.

husband) an unspecified potential future ownership interest in the Edisto Beach Cable TV Company.[17] Thus, while the potential interest in the Edisto Beach Cable System must be charged to WBC for comparative purposes, the interest is tenuous and imprecise and of dubious comparative significance. Most important perhaps, the Edisto Beach Cable System presently serves 210 subscribers with plans to eventually serve a maximum of 600 subscribers. This must be considered a small system of insignificant comparative weight. See *Gainesville Media, Inc.*, 72 FCC 2d 807, 812.

134. The interest of the WBC principals in Hargray CATV Company, Inc. can be more easily determined and evaluated. In March, 1983, the WBC principals and/or their husbands subscribed to 32,000 total shares of stock (28.6%) in Hargray CATV Company, Inc. This interest was outstanding after the "B" cut-off date. While the principals of WBC and their respective spouses agreed to divest themselves of this interest, the divestment statements were not made until April 7, 1983, well past the "B" cut-of date. Thus, notwithstanding the divestment statement[18] and the fact that the stock subscriptions in Hargray CATV Company, Inc. were later terminated in December, 1983, the interest vested and must be considered and charged to WBC under the diversification criteria of the comparative issue.[19]

135. WBC argues that because the former subscription only gave rise to a "potential future interest", they should not be considered. This argument is rejected. These subscriptions, like options, constituted a potential future interest in a media of communications cognizable under the diversification criteria. Options are held gainst applicants for comparative purposes and there is no reason why subscriptions should be treated differently. See *Radio Laredo, Inc.*, 87 FCC 2d 353, footnote 14 (1981). The principals of WBC will therefore be charged with a 28.6% interest in Hargray CATV Company, Inc. for comparative purposes. This company serves 540 subscribers in Hardeeville, 300 subscribers in Ridgeland, and 135 subscribers in Estill, South Carolina. These communities are located 20, 35 and 65 miles, respectively, from Hilton Head. It is expected that the systems, which pass 3400 homes, will eventually serve approximately 1600-1700 subscribers. Although the system is controlled by Gloria

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[17] The convertible debentures, if issued, could have been converted into common stock. The record is silent on whether the conversion rate was ever discussed. Moreover, the record does not permit a determination of what potential ownership interest the WBC principals could have obtained from the debentures.

[18] The divestment statements were not executed contemporaneously with the subscriptions. Rather, they were executed after the "B" cut-off date and they cannot be comparatively credited.

[19] See Orders of the Presiding Judge, FCC 83M-2179, released July 7, 1983 and FCC 84M-441, released January 26, 1984.

Shepard, Leroy Harvey, III spends approximately 8 hours a week supervising and monitoring various aspects of the cable company's operations.

136. Several of the applicants seek to charge WBC with a diversification demerit because of the direct and indirect interest of WBC principals in Hargray Telephone Company.[20] Relying on *Brindlee Broadcasting Corp.*, 56 FCC 2d 138 (1975), some of the applicants argue that WBC should receive a slight diversification demerit because of the "potential for discrimination" resulting from the cross-ownership of a radio station and a local telephone company in the same service area. However, the portion of *Brindlee* relied upon is *dicta,* the Review Board specifically stating that the slight preference awarded to the other applicant "does not affect the ultimate decision". Also, there are factual differences between this case and *Brindlee*[21] and it would appear that common carrier interests should be disregarded under the diversification criteria.[22] Specifically, a telephone company, like any other common carrier, is not a source of news and opinion and it has no control over the content of the information carried through its lines. There is simply insufficient support to consider an interest in a telephone company under the diversification criteria. Accordingly, the direct and indirect interest in the Hargray Telephone Company held by WBC principals will not be considered under the diversification criteria. For comparative purposes, the WBC principals will only be charged with a 28.6% interest in a cable system that serves communities in close proximity to Hilton Head.

137. Because Williams has no other media interests, he is entitled to a preference over the other applicants under the diversification criteria. While the strength of the preference varies from applicant to applicant, because Santee-Cooper, Heritage, and Calibogue Sound all have radio media interests whereas Williams has none, the preference is considered significant. *Henderson Broadcasting Co., Inc., et al.*, 63 FCC 2d 419, 426 (1977). In this connection, it is noted that Santee-Cooper and Heritage each are charged with an interest in one or more stations in South Carolina and Calibogue Sound has an interest in a station in a bordering state. Heritage is also charged with interests in radio stations elsewhere. On a comparative basis, those applicants must be ranked behind Williams on diversification.

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[20] The interest of the WBC principals are set out in paras. 48-51 of the findings and will not be repeated here.

[21] In *Brindlee*, the applicant was 50% owner, President and General Manager of the telephone company and in a position to control the telephone company. No such control exists with respect to WBC's principals' interest in the telephone company.

[22] The diversification criteria serves to prevent a concentration of control of the sources of news and opinion. *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 394.

138. WBC is charged with a 28.6% interest in a cable television system. Cable interests are generally not held to be as significant under diversification as are broadcast interests because "broadcast stations provide unique local and informational programming to their communities of license and adjacent areas". *Greater Wichita Telecasting, Inc.*, FCC 84-72, released March 16, 1984. However, the cable interests chargeable to WBC perhaps take on a somewhat greater significance than would otherwise be the case because the cable company serves communities in close proximity to Hilton Head. Thus, the cable interests chargeable to WBC cannot be ignored or considered lacking in decisional significance. The interest may not be as significant under diversification as the radio stations charged to the other applicants, but it is still sufficient to place WBC behind Williams under the diversification criteria.

139. In summary, because Williams has no other media interests, he is awarded a preference under the diversification criteria. Next is WBC because its chargeable cable interests are not as significant under the diversification criteria as are the other applicants chargeable radio interests. As between Santee-Cooper, Heritage and Calibogue Sound, Calibogue Sound is next because its principals' ownership in the Blackshear, Georgia station is only 50% whereas Santee-Cooper's principal has a 100% ownership interest in the Elloree-Santee, South Carolina station. Heritage is slightly behind Santee-Cooper because, while its ownership position in other licensees is not as great, it has interests in many more stations and Mr. Marshall in addition is a Director and officer of, *inter alia*, the licensees of four stations, two of which are in South Carolina.[23] The interest of the Marshalls in Thrash Broadcasting Company is only .5%, a minuscule interest for comparative purposes. But the interest takes on a little more meaning because Mr. Marshall is an officer and Director of the company.

Integration

140. In determining which applicant will insure the best practicable service to the public, the Commission, in its *Policy Statement on Comparative Broadcast Hearings*, stated that consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners—including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[*i*]t is inherently desirable that legal responsibility and day-to-day performance be closely associated". *Policy Statement, supra* at 395. Full-time, or almost full-time participation in station operation by owners is of primary

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[23] Mr. Durant is also a Director of the South Carolina stations.

interest, particularly when coupled with local residence, broadcast experience and past participation in civic affairs. Part-time participation is of lesser importance. Indeed, participation in station operation must be at least 20 hours a week for integration credit. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (1979).

141. The following Hilton Head applicants propose 100% full-time integration of its principals: Williams, WBC,[24] Heritage. Santee-Cooper proposes 24% full-time integration and 76% part-time integration (20 hours per week); Calibogue Sound proposes 50% full-time integration and some part-time integration by another 50% partner.[25] The disparity in the quantity of integration of the applicants proposing less than 100% integration is too great to be offset by qualitative factors. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (1981). Therefore, those applicants are not serious contenders for an integration preference.[26] The applicants proposing 100% full-time integration must be more closely considered to determine, based on qualitative enhancement factors, which applicant is entitled to a preference.

142. Williams is entitled to substantial enhancement credit because of his 100% minority ownership. *Waters Broadcasting Corp.*, 91 FCC 2d 1260 (1982). No other applicant proposes 100% minority ownership and participation. Williams' integration proposal is further enhanced because he will move to Hilton Head and he has some broadcast experience as an announcer. Some of the other applicants argue that Williams' integration proposal should be discounted because of his alleged involvement in plugola. However, unlike *Radio Station WABZ*, 80 FCC 2d 818 (1982) and *Gainsville Media, Inc.*, 72 FCC 2d 795 (1979), two cases relied upon by WBC, the conduct which is alleged to warrant discounting Williams' integration credit was not shown to be anything more than *de minimus*.[27]

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[24] It is argued that because Engle Harvey does not drive and would depend upon others to drive her to the radio station, her integration proposal should be discounted. However, there is no basis for ignoring Harvey's sworn testimony. She stated she will get to the station by carpooling with friends or relatives and there is no showing that such testimony is unworthy of belief. Moreover, other arguments that Harvey lacks prior broadcast or other work experience has been rejected in other cases. See *Family Broadcasting Group*, 53 RR 2d 662, 667 (1983). There is no evidence that Harvey will not or cannot assume her proposed managerial role at the station.

[25] This partner proposes to be integrated full-time during June, July and August and 25 hours per month the remainder of the year.

[26] In *New Continental Broadcasting Company*, 88 FCC 2d 830, 850, a 12.5% integration difference was held to be a "clear quantitative difference". Here, the differences are much greater.

[27] Efforts to have the issues enlarged after the record was closed were rejected for failure to meet the specificity and sufficiency requirements of Section 1.229 of the Commission's Rules. See Order of the Presiding Judge released January 12, 1984 (FCC 84M-136).

The character of Williams' alleged conduct, as reflected herein, does not require that the integration credit assigned to Williams be diminished.

143. Heritage's proposal is qualitatively enhanced by the following factors. It has 10% minority ownership and 50% female ownership. 90% of Heritage's stockholders reside in Hilton Head, but because such residence did not begin until September, 1981 it is of short duration and at most only entitled to very slight enhancement credit.[28] *Policy Statement,* 1 FCC 2d at 396. Also, because participation in local organizations was of equally short duration, and since there is no showing of participation prior to the Marshall's moving to Hilton Head, only very slight credit can be assigned. Heritage's integration proposal is further enhanced because Mr. and Mrs. Durant will move to Hilton Head and the Heritage principals have past broadcast experience (except for Mrs. Durant, a 5% stockholder).[29] Heritage also receives a slight preference for auxiliary power.

144. While Heritage may have more enhancement factors than Williams, none can be considered as substantial as Williams' 100% minority ownership and participation in a managerial capacity in the operation of a broadcast station. Heritage's local residence is clearly not entitled to substantial enhancement credit because of its short duration. It certainly cannot be equated with the long time local residence in *Radio Jonesboro, Inc.,* FCC 84R-20, released March 21, 1984, wherein the Review Board held that one applicant's 100% minority ownership preference was matched by another applicant's local residence preference. Heritage's other enhancement factors, such as past broadcast experience, 10% minority and 50% female ownership, and auxiliary power, are not enhancing factors of a substantial nature and they do not tip the comparative scale in favor of Heritage over Williams.

145. WBC's integration is enhanced because of its 100% female ownership. But Williams' 100% minority status is superior to WBC's 100% female integration credit. See *Horne Industries, Inc.*, 94 FCC 2d 815 and cases cited therein; *Waters Broadcasting Corp.*, cited *supra.* WBC also claims credit because its principals have knowledge of the Hilton Head area. However, none of the principals are residents of Hilton Head nor do any of them reside within the 1 mV/m contour of the proposed station. Thus, no credit for local residence is warranted. Moreover, only one of the three principals will move to Hilton Head in the event of a grant. WBC gets a slight preference for auxiliary power.

146. Heritage, because of its 10% minority ownership, 50% female ownership, slight credit for 90% short term local residence and civic

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[28] The Heritage application was filed on January 29, 1982.

[29] WBC argues that only Mr. Durant has operating broadcast experience of recent vintage. However, in Radio *Jonesboro, Inc.*, FCC 84R-20, released March 21, 1984, the Review Board awarded credit for broadcast experience acquired more than 20 years ago.

participation, 100% future residence, past broadcast experience of its principals, and auxiliary power proposal, is entitled to a slight preference over WBC. The only enhancement factors favoring WBC is its 100% female ownership and auxiliary power. But these are not sufficient to offset the other enhancement factors favoring Heritage.

147. Williams has received preferences under the two primary objectives toward which the process of comparison has been directed. He has no other media interest and has received a preference under diversification, a comparative "factor of primary significance". *Policy Statement* at 394. He has also been preferred under integration, *i.e.*, the best practicable service. Thus, a grant of Williams' application will better serve the public interest. As between WBC and Heritage, WBC is preferred over Heritage on diversification, but Heritage is preferred over WBC on the best practicable service, *i.e.*, integration. The factors favoring Heritage on the quality of its integration, however, are not enough to offset WBC's preference over Heritage on diversification. Diversification is a factor of primary significance and, on an overall basis, WBC is somewhat preferred over Heritage.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[30] the application of Jesse N. Williams, Jr. for a construction permit for a new FM station in Hilton Head Island, South Carolina IS GRANTED and the competing applications of WBC, Heritage, Calibogue Sound, Santee-Cooper and Plantation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH STIRMER, *Administrative Law Judge*

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[30] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Remand
Site Availability

Proceeding remanded on a site availability issue and for issuance of a Supplemental Initial Decision.
—*South Florida B/cing Company, Inc.*
BC Docket No. 82-731

FCC 84R-89

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

South Florida Broadcasting Company, Inc. North Miami, Florida	BC Docket No. 82-731 File No. BPH-810427AJ
Radiocentro Broadcasting Company Miami, Florida	BC Docket No. 82-733 File No. BPH-810630AJ
First Black Broadcasters of Miami, Inc. Miami, Florida	BC Docket No. 82-734 File No. BPH-810630AK
Constance J. Wodlinger Miramar, Florida	BC Docket No. 82-736 File No. BPH-810630AT
Onyx Broadcasting of Miami, Inc. Miami, Florida	BC Docket No. 82-737 File No. BPH-810701AC
Rana Broadcasting Company, Inc. Liberty City, Florida	BC Docket No. 82-738 File No. BPH-810701AE

Southwest Radio Enterprises, Inc. North Miami Beach, Florida	BC Docket No. 82-742 File No. BPH-810701AN
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: December 7, 1984; Released: December 12, 1984

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of South Florida Broadcasting Company, Inc. (South Florida), Radiocentro Broadcasting Company (Radiocentro), First Black Broadcasters of Miami, Inc. (First Black), Constance J. Wodlinger (Wodlinger), Onyx Broadcasting of Miami, Inc. (Onyx), Rana Broadcasting Company, Inc. (Rana) and Southwest Radio Enterprises, Inc. (Southwest) for authority to construct a new FM broadcast station to operate a Channel 243 at Miami, North Miami, North Miami Beach, Miramar or Liberty City, Florida.[1] The applications were designated for consolidated hearing (along with five other applications subsequently dismissed) by the Chief, Broadcast Bureau (now Mass Media Bureau) pursuant to delegated authority. *See Hearing Designation Order*, 47 Fed. Reg. 50751, published November 9, 1982. In an *Initial Decision* (*I.D.*), FCC 84D-30, released May 16, 1984, Administrative Law Judge Edward J. Kuhlmann (ALJ) granted South Florida's application. The proceeding is now before the Review Board on exceptions (and related pleadings) filed by all of the applicants, except Southwest,[2] and Mary C. Albert.[3] Oral argument on the case was heard by the Board on October 4, 1984.

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[1] The FM frequency, assigned to Miami, Florida in August 1980 as a substitute for Channel 242, became available when the Commission denied the license renewal application of WMJX, Inc. for Miami, Florida Station WMJX(FM), which was then occupying Channel 242. *See WMJX, Inc.*, 86 FCC 2d 251 (1981). WMJX had been given one year to change operations from Channel 242 to 243. *See FM Channel Assignment*, 47 RR 2d 1280 (1980).

[2] The Board deferred review of the exceptions pending settlement negotiations suggested at oral argument held October 4, 1984. *See* Review Board Letter dated October 17, 1984. By letters dated November 5, 9, and 14, 1984, however, the applicants each reported that no settlement has been reached.

[3] Ms. Mary Albert, a former associate with the law firm serving as counsel of record for First Black, also filed a petition for limited intervention on two issues under which the ALJ made comments allegedly reflecting adversely on Ms. Albert's professional reputation. By letter, dated August 20, 1984, the Board indicated that action on her petition would be deferred pending resolution of the entire case.

2. Upon assimilating the briefs on the exceptions, and upon further exploration at oral argument, it became quite evident that some very basic and serious flaws regarding the antenna site(s) specified by most of the instant applications marbleized this entire proceeding. As always reluctant to remand for further evidentiary hearing and, thereby, forestall a decision that would hasten the initiation of a new broadcast service (as well as cause further expenditures to our applicants), we have, in vain, scoured the existing record in the hope that substantial evidence would furnish the fundament for a supportable decision. Unfortunately, regarding the essential matter of the availability of a transmitter site to most of the applicants herein, the record may be likened to a bikini bathing suit: what it reveals is interesting, but what it obscures is vital.

3. It is elementary that a prospective construction permittee must have, if little else, an antenna site, a technical keystone of the broadcasting operation. Just as elementary in FCC law is the proposition that, when an application is filed, "[t]he specification of a site is an implied representation that an applicant has obtained reasonable assurance that the site will be available." *Retherford Publications, Inc.* (Miami Docket Nos. 84-841, 842), Mimeo 6366, released September 6, 1984, at para. 10 (M.M. Bur.) (misrepresentation and site availability issues added). Consequently, if an applicant becomes aware during the course of a proceeding that a previously specified site may not be available, the Commission must be advised forthwith (*see* 47 CFR §1.65). Therefore, in two recent cases we have held that where an applicant is in possession of an unequivocal declaration from the site owner (or the owner's representative) that the site is likely to be unavailable, that declaration vitiates the "reasonable assurance" the applicant must have to continue to specify the site. *See Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *review denied*, FCC 84-119, released April 2, 1984 (Comm'n), *appeal pending sub nom. Royce Int'l Broadcasting Co.* v. *FCC*, No. 84-1168 (D.C. Cir.); *Valley FM Radio*, FC 84R-86, released December 4, 1984 (Rev. Bd.). If an applicant unexpectedly loses a site it had "reasonable assurance" of acquiring, it may seek to amend its application by meeting the stringent "good cause" test set forth in 47 CFR §73.3522(b). *California Broadcasting Corp.*, 90 FCC 2d 800 (1982). With that outline, we proceed to this case.

4. The ALJ disqualified one applicant herein, Radiocentro, because it did not have an antenna site. Whereas Radiocentro had proposed a site shared by radio station WAIA-FM, Miami, Florida, WAIA advised unequivocally that Radiocentro could not use that site. *I.D.*, paras. 81-83. Despite being aware since November 17, 1981 that it was flatly denied the right to use WAIA's antenna, Radiocentro has not sought to amend, but seeks rather to "presume" that WAIA's site will be available to it by

casual extension of the principle set out in *George E. Cameron, Jr. Communications*, 71 FCC 2d 460 (1979).[4] The ALJ rejected Radiocentro's audacious, though bizarre, expansion of *George E. Cameron, Jr. Communications, see I.D.*, paras. 148-149. Thus, for purposes of this remand, Radiocentro has no required part to play whatsoever; but as a party, it may participate if it so chooses.[5]

5. Of the other applicants, First Black, South Florida, Rana, Onyx and Wodlinger all proposed to use the same antenna site. *I.D.*, para. 3. The structural tower is owned by Candleabra, Inc.; is located on the southeast corner of 33rd Avenue and Pembroke Road, Pembroke Park, Florida; and it currently supports the antennae of WHFT-TV, WKID-TV, WAXY-FM, WKQS-FM, WHYI-FM, WCIX-TV, WWJF-FM, and WSHE-FM.[6] On April 15, 1981, Candleabra entered into an option agreement with First Black to lease to it available antenna space on the tower in the event that its application was granted.[7] While the other applicants, in varying degrees of formality, apparently discussed the Candleabra site with its representative, Ronald Crider, and may have been told that an option for space *might* be negotiated with them, *see, e.g., I.D.*, para. 67, the ALJ records that:

> On December 6 and 7, 1982, Ronald Crider wrote letters to several applicants in this proceeding including William Hernstadt, Constance J. Wodlinger, Onyx, South Florida Broadcasting and Rana, in which he explained that they had no reasonable assurance of obtaining space on the Candleabra tower. The recipients of the letters were invited to contact Mr. Crider if they had any questions concerning the letter.

Id., at para. 71. Moreover:

> On January 3, 1983, Mr. Crider executed an affidavit to the effect that Ms. Wodlinger, South Florida Broadcasters [sic], Onyx and Rana had specified the Candleabra site but had no agreement with Candleabra to lease space. He averred that even if First Black Broadcasters did not obtain a construction permit, Candleabra could not give assurance that space would be available on the tower because of lease arrangements with other parties.

Id., at para. 72. Further:

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[4] In *George E. Cameron, Jr.*, the Commission held that a license challenger in a "comparative renewal" situation could assume the availability of the incumbent's facilities so as to avoid "... burdening the challenger with a disqualifying [site availability] issue." 71 FCC 2d at 467. It extended this principle in *New Continental Broadcasting Co.*, 45 RR 2d 1632 (1979), to the deleted facilities of a defunct broadcaster. For a more recent exposition on the extent to which these principles may or may not be extended, *see GACO Communications Corp.*, 94 FCC 2d 761, 700-773 (Rev. Bd. 1983), *modified on other grounds*, FCC 84-212, released May 14, 1984 (Comm'n).

[5] To the extent that this interlocutory order does not rule on Radiocentro's exceptions to its disqualification on the antenna site issue, these will be addressed — if the necessity remains — in our disposition of the case following the supplemental hearing ordered herein.

[6] First Black Exceptions at 16-17 (*quoting* F.B. Exh. 9).

[7] *See id.*

> Subsequently, on January 7, 1983 First Black Broadcasters filed petitions to enlarge against Ms. Wodlinger, Rana, Onyx and South Florida Broadcasting. These petitions ... alleged that, by virtue of First Black Broadcasters' option for space in the Candleabra tower and the contingent options for First Black Broadcasters' space, the other parties in the proceeding could not have reasonable assurance that the tower was available.

Id., at para. 73. And:

> First Black Broadcasters also claimed that Candleabra had granted non-broadcast third parties the right to use its antenna if First Black Broadcasters did not exercise its option.

Id., at para. 65.

6. Based upon the ALJ's acceptance of responses to First Black's petitions, no site availability issues were designated. *See I.D.*, para. 77.[8] Although it seems that, on several occasions, Crider advised at least some of the other applicants that they might be able to obtain options for the tower space in the event that First Black did not prevail, *see, e.g., id.* at paras. 67, 71,[9] he at other times advised certain applicants — in the words of the ALJ — "that there was no space on the Candleabra tower but that the tower might be reconfigured to accommodate an antenna." *I.D.*, at para. 75.[10]

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[8] Rather, based upon his view that First Black principals and counsel had interfered with the efforts of other applicants to obtain the Candleabra site, the ALJ charged First Black with a "substantial comparative demerit." *See I.D.*, paras. 152-159. Exceptions to that demerit have been filed, but we do not rule on those at this time or in this order. However, if First Black *did* seek to interfere with the others' "reasonable assurance" (*if any*), that would be a disqualifying abuse of process. *Cf. GACO Communications Corp.*, 94 FCC 2d 761, 781 n.71 (Rev. Bd. 1982).

[9] Indeed, it may even be that First Black's option — for which it paid substantial sums — was assignable to any successful applicant. *See I.D.*, para. 76; South Florida Reply at 16. *But see infra* note 20.

[10] As a property owner, nothing prevented Candleabra from playing — or, more importantly, actually being — "hard to get." *See infra* para. 9 & note 15. Nevertheless, it is asserted:

> Some applicants like First Black, and subsequently, William Hernstadt, agreed to Mr. Crider's efforts to 'maximize the profit potential' of peddling what Mr. Crider apparently considered 'reasonable assurance' of site availability. ... Others, like South Florida, Wodlinger, Onyx and Rana avoided being drawn into the substantial payment demands made by Mr. Crider, in view of the totality of his words and actions, which otherwise indicated that the site would be available to the successful applicant in this case.

South Florida Reply at 15 n.22 (citations omitted). *But see William F. Wallace*, 49 FCC 2d 1424, 1427 (Rev. Bd. 1974) (mere statement by site owner — who already had tower on land — that "he could foresee 'no problem' " with applicant's use of site not "reasonable assurance" where lease terms remained to be negotiated; site issue added); *El Camino Broadcasting Corp.*, 12 FCC 2d 25, 26 (Rev. Bd. 1968) ("mere possibility" of site insufficient where owner is depicted as "willing to discuss lease arrangement"; site issue added).

7. Because no site availability issues were added against the subject applicants, the issue was never joined in a manner that permits of clear resolution of the following substantial and material questions of fact: (1) did the parties who failed to meet Candleabra's condition that they obtain an option in order to assure tower space have any legitimate basis on which to claim "reasonable assurance" of that site, either before or after Crider's letters of December 6 and 7, 1982[11]; and (2) do any such applicants presently have "reasonable assurance" of *any* antenna site.[12] An evidentiary hearing on these questions, followed by the ordinary findings of fact and conclusions of law, is necessary before we can proceed with our own "reasonable assurance" that the record evidence carries our conclusions.

8. In litigating the indicated issues, pertinent principles of law should be uppermost. First, while it has been held that a written agreement is not the *sine qua non* of our "reasonable assurance" test, *Eastside Broad-*

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[11] In fact, following receipt of Crider's letter, at least one applicant advised the Commission that "reasonable assurance" of the Candleabra site was in doubt. *See, e.g.*, Wodlinger Reply at 9.

[12] Indeed, on the very eve of this order, we received a petition for leave to amend (filed December 3, 1984) from Onyx seeking to specify a new site. However, as we explained in *Shoblom, supra*, an applicant will not be permitted to amend where it did not have the requisite "reasonable assurance" to begin with, and *that* is one of the key questions here at issue. As the Commission just represented to the Court of Appeals upon review of *Shoblom*:

> . . . the Commission has consistently emphasized that where 'proposed amendments are of an engineering nature, [applicants] are required to meet not only the usual good cause criteria but also the additional requirements set forth in section [73.3522(b)].' *Charlottesville Broadcasting Corp.*, 2 F.C.C.2d 679 (Rev. Bd. 1966). *See also, California Broadcasting Corp.*, 90 F.C.C.2d 800, 802, 808-09 (1982); *Belo Broadcasting Corp.*, 68 F.C.C.2d 1313, 1320 (1978), *recon. granted in part*, 88 F.C.C.2d 922 (1981); *Charles W. Hurt*, 21 F.C.C.2d 827, 829 (Rev. Bd. 1970); *Outer Banks Radio Co.*, 13 F.C.C.2d 385 n.3 (Rev. Bd. 1968). The Commission has explained that the purpose of the requirements of Section 73.3522(b) 'is to secure the most expeditious disposition of hearing cases by freezing proposals of the applicants, thereby clearly delineating the issues and the scope of hearing and permitting adequate preparation and presentation by all the parties.' *Belo Broadcasting Corp.*, 68 F.C.C.2d at 1320.

Brief of FCC in *Royce Int'l Broadcasting, supra*, at 17. Accordingly, the issues ordered in this hearing are to be resolved and a *Supplemental Initial Decision* on those issues submitted before we will rule on Onyx's amendment petition (or that of any other applicant seeking to amend similarly). *See Colorado Television, Inc.*, 56 RR 2d 1080, 1084 & n.6 (Rev. Bd. 1984) (site change amendment will not be accepted where "chain of good cause has long since been broken") (applications for review pending). Only after these issues are tried can we determine if " . . . the amendment is necessitated by events which the applicant could not reasonably have foreseen . . . ." 47 CFR §73.3522(b)(1)(i). Onyx's petition will be held by us in abeyance pending our review of the *Supplemental Initial Decision*.

casting Co., 1 RR 2d 763, 765 (Rev. Bd. 1963) (uncontradicted oral promise of land owner to lease sufficient), it is equally held that a facially valid communication from the site owner's authorized representative denying use of that site undermines whatever "reasonable assurance" might have preceded the negative communication. *Shoblom Broadcasting, supra*; *Valley FM Radio, supra.* Likewise, where the site owner expressly conditions access to the site and those conditions are not met or unlikely to be met, it cannot be glossily claimed that one has "reasonable assurance" of the site nonetheless. For example, it appears in this case that Candleabra may have been willing, at certain times, to assure space on its already-crowded tower upon the payment for an option, as did First Black. Thus, it is submitted: "One fact clearly emerges from the record, however, and that is Mr. Crider's willingness to make the Candleabra site available to anyone willing to pay."[13] Yet:[14]

> It is undisputed that Wodlinger, South Florida, Rana and Onyx have, to date, elected not to enter into binding option agreements with Candleabra, Inc.

It is largely irrelevant whether an applicant believes that a particular site owner's conditions for assurance of a site are "unreasonable" (*see, e.g., supra* note 10); indeed, it might be fairly said that the *more* unreasonable the site access conditions, the *less* likely it is that the site will be acquired and, it follows, the *less* "reasonable assurance" an applicant has of that site.

9. Second, we reject the following claim:[15]

> Under the circumstances presented in this case, it must be presumed that the Candleabra, Inc. tower site will be available to the successful applicant herein. *New Continental Broadcasting Co.*, 45 RR 2d 1632 (1979); *George E. Cameron, Jr. Communications (KROQ), supra.*

Neither *New Continental* nor *George E. Cameron, Jr.* are in the least relevant here. Candleabra is not an incumbent licensee fending off a rapacious challenger as in *George E. Cameron*, and the Commission's reasons for there permitting the novel "presumption" to another's property are here inapposite.[16] Additionally, while First Black has a solid

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[13] South Florida Reply at 15 n.22. Willing to pay for an option?

[14] Wodlinger Reply at 10.

[15] *Id.*, at 11. Even in *George E. Cameron, Jr.*, where the Commission was addressing a recalcitrant incumbent licensee attempting to stave off a challenger, the Commission recognized:

> . . . we cannot and will not compel an unsuccessful incumbent to sell or lease its facilities to the challenger. *RKO General, Inc. (WOR-TV)*, 49 FCC 2d 106, 108, 31 RR 2d 883, 886 (Rev. Bd. 1974).

[16] The Commission amplified its *George E. Cameron, Jr.* rationale for permitting a license challenger to specify the incumbent's site in *Belo Broadcasting Corp.*, 88 FCC 2d 922 (1981), where it said:

> . . . the Commission expressed its desire that as many qualified applicants as

option for space on the Candleabra tower, it is not at all clear that Candleabra cannot, or does not plan to, saturate its tower with nonbroadcast users should First Black's application fail, *see I.D.*, para. 65; note 18, *infra.*[17] Furthermore, we are not here dealing with the physical facilities of a defunct licensee as in *New Continental* where the Commission opined that an applicant could specify such deleted facilities "... given the fact that towers, transmission facilities and other equipment are already located there, making broadcasting its logical use." 45 RR 2d at 1633. Insofar as the instant record shows, Candleabra may not be for lack of nonbroadcast tenants, and its representative, Crider, has averred:[18]

> Even if the construction permit application of First Black Broadcasters is denied, Candleabra cannot give reasonable assurance at this time that space will be available on its existing tower for any of these other FM applicants because of the lease agreements entered into with other parties which are contingent upon the denial of the application of First Black Broadcasters.

10. Over and above the foregoing, however, and putting aside the Board's probable lack of authority to extend the *George E. Cameron, Jr.* or *New Continental* "presumptions" to situations never remotely contemplated by the Commission, there appear to us to be very strong equity-based reasons for not permitting competing applicants to simply specify another's secured site on the blithe "assumption" that the site owner will freely lease to any eventual broadcast permittee. Here, for example, First Black has been the only party to meet Candleabra's express condition for assuring tower space, and it has apparently spent many thousands of dollars to maintain its claim to the site.[19] To permit subsequent applicants

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> possible compete for the available stations which had been poorly operated under the incumbent's previous stewardship. Yet the incumbent's concerted efforts to preclude the use of its facilities by any challenger was in direct defiance of the Commission's specific mandate. Thus, the only means to assure that the incumbent did not freeze out potential competitors, and that the challenger remain a viable applicant, was to grant the proposed [site] amendment.

Id., at 928-929 (footnote omitted).

[17] In that connection, we were taken by a recent editorial cartoon by Jack Schmidt (*Broadcasting*, November 26, 1984, at 98) which depicted two figures surveying a tower thoroughly bedecked by all manner of communications antennae — whip, dish, spike, *etc.* The caption reads: "We made so much money by renting out antenna space on our tower that we gave up broadcasting."

[18] First Black Exceptions at 17 (*quoting* F.B. Exh. 9). *See also id.*, at 13, where Crider is reported to have informed First Black counsel "... that Candleabra has made agreements with other communications entities contingent on denial of the First Black application."

[19] As explained by counsel for Onyx:

ONYX COUNSEL: Prior to filing the application, sir, our president testified and indicated that he spoke to Mr. Crider regarding the availability of the to merely "assume" a competing optionee's site or a right of succession[20] would put a costly premium on being the first to secure a site and would perversely penalize the prudent. In our view, applicants should not be allowed to sit back while a competitor truly secures "reasonable assurance" of a site — often at considerable expense — and then languorously sit on their assumptions.[21]

11. On the state of this record, it appears that there is some merit in First Black's assertion that "[t]he Judge failed to explore undisputed questions of fact and conflicts in sworn testimony which abound in the record."[22] There are many unresolved contradictions here, including those in Crider's statements and accounts,[23] as well as in the representations of the applicants other than First Black as to the bases for their alleged "reasonable assurance" of the Candleabra site — past, present and

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> site. Mr. Crider said the site would be available if, in fact, he would receive $25,000 down and $1,000 [per month]. Actual payments would be about $40,000 per year. Thus, Mr. Crider in no uncertain terms said that site was available *if* we pay the money.

Tr. of Oral Arg., B/c Dkt No. 82-731 *et al.* (October 4, 1984), at 1230-1231 (emphasis added). But, as the saying goes: "If wishes were horses then beggars would ride."

[20] While there is some evidence to the effect that First Black's option to the Candleabra site might have been assignable to any applicant here successful, *see I.D.*, para. 76, it also appears that any applicant seeking to assume that option (if possible) would — at a minimum — have had to reimburse First Black for all of its prior option expenses. *See, e.g.*, First Black Exceptions at 40. However, we are told:

FIRST BLACK COUNSEL: ... No one has ever agreed to reimburse First Black and, indeed, Rana rejected any idea that these expenses should be reimbursed to First Black.

Tr. of Oral Arg., *supra* note 19, at 1187.

[21] Similar reasoning was articulated just recently by Administrative Law Judge Stirmer, who expressly refused to extend *George E. Cameron, Jr.*, to permit one applicant to "assume" that its competitor's option on a transmitter site would accrue to it should it prevail; misrepresentation and site issues were added. *Professional Radio, Inc.*, FCC 84M-4939, released November 26, 1984, at paras. 12-14. We are not saying that all of the instant applicants did *absolutely* nothing; the question is: did they do enough to claim "reasonable assurance"?

[22] First Black Exceptions at 37. We daresay, no criticism attends the ALJ for not exploring "undisputed questions of fact." But we believe First Black's *faux pas* here is a product of the "stream of consternation" style of the narrative used throughout its pleadings, a great bulk of which is a rambling diatribe against the presiding ALJ. Less passion and more precision would have been helpful before the Board and, perhaps, spared First Black its many heated dust-ups with the ALJ. Friction does not conduce effort, but retards it.

[23] Direct testimony from Crider, and cross-examination, might have resolved important differences, but no such testimony was permitted by the ALJ. *See* Onyx Reply at 13. Of course, no issue at all was designated. *I.D.*, para. 77.

future. Testimony from, and cross-examination of, all of the implicated parties will help clarify this impossible muddle.

12. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for adduction of evidence on the following issues and the issuance of a *Supplemental Initial Decision*:

(1) To determine which applicants, if any, had reasonable assurance of an antenna site at the time(s) represented to the Commission; and

(2) To determine whether such reasonable assurance, if any, was vitiated by subsequent events and the actions taken thereafter by the applicants; and

(3) To determine on what basis, if any, the applicants have until now maintained their assertions of reasonable assurance if clearly notified that their site would be unavailable unless the site owner's conditions were met; and

(4) To determine what reasonable assurance, if any, the applicants presently have of the site specified throughout the original hearing.[24]

13. IT IS FURTHER ORDERED, That the burdens of proceedings with the introduction of evidence and proof under the issues added herein SHALL BE upon the respective applicants.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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[24] We will not, at this time, designate reporting, lack of candor, or misrepresentation issues, but give the conventional leave to the ALJ to add such issues as the evidence may indicate.

FCC 84D-30

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
South Florida Broadcasting Company, Inc. North Miami, Florida	BC Docket No. 82731 File No. BPH-810427AJ
Radiocentro Broadcasting Company Miami, Florida	BC Docket No. 82-733 File No. BPH-810630AJ
First Black Broadcasters of Miami, Inc. Miami, Florida	BC Docket No. 82-734 File No. BPH-810630AK
Constance J. Wodlinger Miramar, Florida	BC Docket No. 82-736 File No. BPH-810630AT
Onyx Broadcasting of Miami, Inc. Miami, Florida	BC Docket No. 82-737 File No. BPH-810701AC
Rana Broadcasting Company, Inc. Liberty City, Florida	BC Docket No. 82-738 File No. BPH-810701AE
Southwest Radio Enterprises, Inc. North Miami Beach, Florida	BC Docket No. 82-742 File No. BPH-810701AN
For Construction Permit for a New FM Station	

Appearances

Michael H. Rosenbloom and *John H. Vetne* on behalf of South Florida Broadcasting Company; *Thomas W. Fletcher* on behalf of Radiocentro Broadcasting Company; *Joseph F. Hennessey* and *Paula Argento* on behalf of First Black Broadcasters of Miami, Inc.; *Michael R. Miller* on behalf of Constance J. Wodlinger; *Matthew L. Leibowitz* and *Joseph A. Belisle* on behalf of Onyx Broadcasting of Miami, Inc.; *Dennis F. Begley* and *Cheryl A. Kenny* on behalf of Rana Broadcasting Company, Inc.; and *Bruce A. Eisen* on behalf of Southwest Radio Enterprises, Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: May 9, 1984; Released: May 16, 1984

1. These applications are for a construction permit for a new FM station to operate on Channel 243 at Liberty City, Miami, Miramar, North Miami, or North Miami Beach, Florida. They were designated for hearing, along with five other applications that have since been dismissed, by the Chief, Broadcast Bureau, acting pursuant to delegated authority on October 21, 1982. *Hearing Designation Order*, 47 Fed. Reg. 50751 (1982).[1] The following issues remain for determination:

1. To determine the areas and populations which would receive primary aura service (1 mV/m or greater) from the proposed operation of the new applicants and the availability of other primary service to such areas and populations.

2. To determine, with respect to Rana Broadcasting Company, Inc., whether Liberty City is a principal community or political subdivision in accordance with Section 73.1120 of the rules.

3. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

4. To determine whether the transmitter site proposed by Radiocentro Broadcasting Company and Southwest Radio Enterprises, Inc. is available.

5. To determine whether Southwest Radio Enterprises, Inc. lacked candor and/or misrepresented information to the Commission regarding the availability of its proposed site and, if so, to determine the effect thereof on its basic and comparative qualifications to be a Commission licensee.

6. To determine whether First Black Broadcasters, in contractual dealings or other contacts, with Candleabra, Inc., or with representatives of Candleabra, has

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[1] The applications of Everglades Broadcasting Corp. (BPH-810630AM, Miami); Hispanic Community Broadcasters, Inc. (BPH-81070AH, Miami); and Elayne Boros and Marian Feniger d/b/a Flamingo Broadcasters (BPH-810701AI, Miami) were dismissed with prejudice on April 20, 1983. *Order*, FCC 83M-1341, released April 22, 1983. The applications of Unity Broadcasting Network - Florida, Inc. (BPH-810427AL, Miami) and William Hernstadt (BPH-810701AK, North Miami Beach) were dismissed on June 24, 1983. *Memorandum Opinion and Order*, FCC 83M-2107, released June 28, 1983.

sought to obstruct the availability of antenna space or otherwise interfere with the prosecution of competing applications by applicants who have designated the Candleabra tower for broadcast antenna facilities, and, if so, to determine the effect of such conduct on First Black Broadcasters' basic and/or comparative qualifications to be a Commission licensee.

7. To determine whether First Black engaged in misrepresentation or exhibited a lack of candor to the Commission in asserting the unavailability of an antenna site on the Candleabra tower, and, if so, to determine the effect of such misrepresentation or lack of candor on First Black Broadcasters' basic and/or comparative qualifications to be a Commission licensee.

8(a) To determine the details surrounding Garth C. Reeves' option in Rana Broadcasting and its impact on the comparative qualifications of Rana Broadcasting.

(b) To determine whether Rana Broadcasting violated Section 1.65 of the rules by failing to report timely and completely the Reeves' option and broadcast interests.

(c) Whether the facts found in (a) and/or (b) require comparative demerits.

9. To determine whether Onyx Broadcasting of Miami, Inc., violated Section 1.65 of the Commission's rules by failing to document its financial qualifications as required by the Commission's June 2 *Order*, 94 F.C.C. 2d 452, 455, and, if so, to determine the effect of such noncompliance on the applicant's comparative qualifications to become a Commission licensee.

10. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

11. To determine in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. A prehearing conference was held on January 6, 1983, and sessions for oral cross-examination were held on May 23, 24, 25, 26, 1983 and January 17, 1984. Written cross-examination was conducted on Issues 2 and 3, the principal community and §307(b) issues, during July and August, 1983.[2] The record was closed on January 19, 1984. Proposed findings of fact and conclusions of law were filed by all parties on February 7, 1984 and replies were filed by all parties but Radiocentro Broadcasting on February 28, 1984.

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[2] The reasons for conducting written cross-examination, a description of the procedures governing written cross-examination, and various rulings that resulted from the procedures are discussed in *Order*, FCC 83M-1672, released May 20, 1983; *Memorandum Opinion and Order*, FCC 83M-1829, released June 3, 1983; *Memorandum Opinion and Order*, FCC 83M-2565, released August 4, 1983 at 5-6; *Memorandum Opinion and Order*, FCC 83M-2880, released August 29, 1983.

Findings of Fact

The Areas and Populations That Will Receive Primary Aural Service and the Availability of Other Primary Service to Those Areas and Populations

3. All applicants propose to operate with the same effective radiated power. Joint Exh. 1 and 2. In addition, with the exception of Southwest and Radiocentro, all applicants propose to use the same transmitter site. Accordingly, the signal coverage proposed by South Florida Broadcasting, First Black Broadcasters, Constance J. Wodlinger, Onyx and Rana (hereinafter "Candleabra Group") is identical. Joint Exh. 1 at 7. The transmitter sites of all applicants are in close proximity to each other. Further, each of the applicants proposes to place a city grade signal over each of the other applicants' proposed principal community. Joint Exh. 1 at 5.

4. The differences in signal coverage among the applicants is summarized in the following tables.[3]

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[3] The tables are found at Joint Exh. 1 at 10 and Southwest Exh. 6. During the daytime, at least five other aural services are available within the uncommon area of each applicant. Joint Exh. 1 at 2.

A. *TABULATION FOR DAYTIME SERVICES OF POPULATIONS AND AREAS OF CERTAIN UNCOMMON AREAS*

	Population	*Area*
1. Service of Candleabra Group not served by:		
a. Radiocentro	15,233	187.2
b. Southwest	279,866	1759.9
2. Service of Radiocentro not served by:		
a. Candleabra Group	466	65.2
b. Southwest	265,099	1637.9
3. Service of Southwest not served by:		
a. Candleabra Group	0	0
b. Radiocentro	0	0

B. *TABULATION OF POPULATION AND AREAS WITHIN OTHER AURAL SERVICE AREAS IN DIFFERENTIAL AREAS DURING NIGHT HOURS*

	Population	*Area*
1. 1mV/m service of Candleabra Group having:		
a. only two other aural services	17	10.4
b. only three other aural services	31	36.7
c. only four other aural services	6	14.0
2. 1mV/m service of Radiocentro having:		
a. only two other aural services	39	11.4
b. only three other aural services	86	8.5
c. only four other aural services	4	14.3
3. 1mV/m service of Southwest having:		
a. only two other aural services	0	0
b. only three other aural services	0	0
c. only four other aural services	0	0

Rana Broadcasting's Designation of "Liberty City" as Principal Community or Political Subdivision Pursuant to 47 C.F.R. §73.1120

5. The Mass Media Bureau stated in the *Hearing Designation Order* at par. 2 that the information before it, including census data, provided "no evidence" that Liberty City is a principal community or political subdivision for purposes of §73.1120. "Liberty City appear[s]," the Bureau stated "to be no more than a neighborhood in Miami." *Id.* The facts developed during the hearing demonstrate that Liberty City has the following characteristics.

6. The area commonly referred to as Liberty City is partly within the city limits of Miami and partly within the unincorporated section of Dade County. It is defined by Rana as bounded on the south by NW 36th Street and north to NW 79th Street and on the west to NW 37th Avenue and east to NW 7th Avenue. Rana Exh. 5 at 1. In Miami, the area is defined by NW 7th Avenue to NW 17th Avenue and 37th Street to NW 71st Street. Rana

Exh. 5 at 1. These boundaries in general have been, for twenty years, an area where blacks have lived in Miami. Rana-Reeves to SFBC 12A and 12E.[4] The area is referred to as Liberty City because it is an area where blacks found freedom from oppression. Rana-Reeves to SFBC 12A. In 1970, in the area known as Liberty City, 91 percent of the residents were black; the population then was 81,168, but by 1980 it had diminished to 66,734. Rana-Reeves to SFBC 13. 1980 Census Tracts, Miami, Florida, SMSA 1980, PHC 80-2-241, Table P-1, at 8, 13, 14, 35 and 36.

7. The Liberty City area is economically depressed. Rana Exh. 5 at 2. Its problems include unemployment, poverty, sub-standard housing, and crime. Rana Exh. 5 at 2. Efforts have been undertaken to revitalize the area. A Business Assistance Center was established by the Greater Miami Chamber of Commerce to assist Liberty City businesses and the Dade County Revitalization Board has attempted to attract foreign businesses to Liberty City. Rana Exh. 5 at 3, 63. Onyx/FBB (First Black Broadcasters)-Lotz to Rana 13.

8. There have been, and continue to be, other efforts to address the problems of the Liberty City area. The area has received a Model City grant and efforts have been made to establish the area as an enterprise zone which would provide tax and zoning regulations, purportedly, to spur economic development. Rana Exh. 5 at 2-3, 39-42, 66. There have also been attempts to incorporate the part of Liberty City located in Dade County. Rana Exh. 5 at 1, 7.

9. Garth C. Reeves, Sr., editor and publisher of the *Miami Times,* a weekly newspaper published in Liberty City, stated that the residents of the area have common social interests, educational interests, and cultural background. Rana-Reeves to SFBC-15. Aileen Lotz testified that Liberty City residents see themselves as residents of Liberty City rather than of Miami or Dade County. Onyx/FBB-Lotz to Rana 3. Residents of Liberty City testified that they believe Liberty City is a separate community. Rana Exhs. 8, 12, 12. There are stores, health services, libraries, schools, churches and parks within the Liberty City area. Rana Exh. 5 at 3-4.

10. Police and fire protection are, however, provided by Miami or Dade County and the schools are part of the Dade County system. One of Dade County's fire districts, the North Central District, encompasses approximately the same area as Liberty City and the Dade County schools in Liberty City enroll 80 percent of the county's black students. Rana Exh. 5 at 4.

11. Liberty City has more than 60 civic and social organizations. Rana Exh. 5 at 112-13. They range from social service agencies such as the James E. Scott Community Association, to business and professional

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[4] Citations to written cross-examination are to be read as follows: Rana-Reeves (applicant-witness responding) to SFBC 12A and 12E (South Florida Broadcasting questions).

organizations such as the Martin Luther King Economic Development Corporation, the Business Assistance Center, the Model City Development Board, the National Council of Negro Business and Professional Women, and the 18th Avenue Merchants Association, to cultural groups such as the Model City Center for Cultural Arts and the Afro Arts Theatre Group. Onyx/FBB-Lotz to Rana 12; Rana Exh. 5 at 112. Black leadership and heritage groups such as the Liberty City Branch-NAACP, the Greater Miami Youth Council-NAACP, the Afro Americans, the Coalition of Black Citizens and the Black Archives are located in Liberty City. Rana Exh. 5 at 112; Rana-Reeves to Onyx 13.

The Proposals Considered Pursuant to Section 307(b)'s Standard of Fair, Efficient and Equitable Distribution of Radio Service

12. Rana has applied for Liberty City; Radiocentro, First Black Broadcasters, and Onyx for Miami; Constance J. Wodlinger for Miramar; South Florida for North Miami; and Southwest for North Miami Beach. According to the 1980 Census, the population of each community is as follows: Miami - 400,061, Liberty City - 66,734, North Miami - 42,566, North Miami Beach - 36,553, and Miramar - 32,813. South Florida Exh. 12 at 9; Onyx Exh. 12-B at 16, 25; Onyx Exh. 12-E at 1, 12; Wodlinger Exh. 3-B.[5] Only Liberty City lost population from 1970 to 1980, all of the other communities experienced population growth. *Id.* Miami has 8 AM, 9 FM, and 10 TV stations; the other communities have none. South Florida Exh. 12 at 60. Joint Exh. 1.

13. *Dade/Broward SCSA.* Mr. M. Barry Peterson is executive director of the South Florida Regional Planning Council, Florida's regional planning agency for the area situated mainly south and east of Lake Okeechobee and stretching from Key West to Boca Raton. In this capacity, he directs a comprehensive planning and policy process which involves investment and development decisions aimed at meeting the demand of one of the fastest growing populations in the United States. Mr. Peterson is an expert in urban planning; he testified about the characteristics of Dade and Broward Counties. Onyx Exh. 6.

14. Mr. Peterson explained that since the early 1950's Dade and Broward Counties and the municipalities within them have constituted a contiguous metropolitan area. These South Florida counties are interdependent in terms of economy, employment, environment, population trends, housing, tourism, recreation, cultural resources, water resources, waste disposal and transportation needs. In August 1975, in recognition of the unique relationship between them, the United States Office of

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[5] 1980 Census data about Liberty City was not published until after the hearing. Rana (Proposed Findings at 5, n. 4) requests official notice of the recent statistics; its request is granted.

Management and Budget officially designated Broward/Dade as a Standard Consolidated Statistical Area. Dade/Broward is one of only thirteen such SCSA's within the United States. Onyx Exh. 6 at 4-5.

15. Mr. Peterson stated that traffic studies and census data demonstrate that large numbers of residents in both Dade and Broward Counties live in one local municipality or unincorporated area, while they work, shop or play in other jurisdictions. For example, only 34 percent of the workers, 16 years or older, who live in North Miami, work within that city. Similarly, only 24 percent and 21 percent of the workers residing within North Miami Beach and Miramar respectively work within those cities. This results in the incorporated areas of North Miami, North Miami Beach and Miramar serving as residential or bedroom communities. Onyx Exh. 6 at 6.

16. Another example of the interdependence of the population groupings within Dade and Broward cited by Mr. Peterson is that the citizens of Miramar, North Miami and North Miami Beach use train service in Hollywood, Florida, commercial air transportation service in Fort Lauderdale or Miami and shop in regional shopping malls dispersed throughout Dade and Broward Counties. They participate in cultural and recreational activities in other municipal jurisdictions. Their interdependence is such that, in Mr. Peterson's opinion, Dade and Broward Counties should be viewed in a context of a single contiguous urbanized metropolitan area. Onyx Exh. 6 at 6-7.

17. Aileen R. Lotz is an urban planner by education and experience. She has served in numerous responsible governmental positions in the Miami area, including tenure as executive director of the Dade County Charter Review Commission, as director of the Dade County Department of Human Resources and as senior administrative assistant in the County Manager's office. She is the author of numerous articles on local government which have appeared in national professional and governmental publications. Ms. Lotz is an expert on metropolitan Dade County and surrounding areas. She provided insight into the characteristics of Metro Dade. First Black Exh. 31.

18. Ms. Lotz explained that metropolitan Dade County is the largest metropolitan area south of the greater Atlanta area. From a population of 315,060 in 1945, metropolitan Dade County has grown to 1.7 million. First Black Exh. 31 at 2. In the mid-1950's it became apparent that the then existing pattern of county and city governments was inadequate to cope with the problems that constantly arose in the Miami metropolitan area. This fact was recognized by the Supreme Court of Florida as early as 1956 when it upheld the system of metropolitan governance. The court found:

> . . that few, if any, municipalities in Dade County are composed of a cohesive, homogeneous population since practically all of them are interdependent in many ways; that there are thousands of people in Dade County who live in one

> municipality, have employment, offices, positions or working places in another, shop or trade in another and whose children attend school in still another. The density of population, common transportation and communications facilities, the mutual dependence on public utilities, the unified economy of the county, the common problem of drainage, transportation, communication, water supply, sewage, garbage collection and disposal, fire protection, zoning and planning for future development, demonstrate that municipal boundary lines are little more than artificial barriers that are outmoded by present needs and conditions.
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> *Gray v. Golden*, 89 So. 2d 785 (Fla. 1956).

19. The Florida Supreme Court's observations concerning the characteristics of Dade County are echoed in the following discussion of the identification of citizens with their home towns, found in Dr. Reinhold P. Wolff's book, *Miami Metro*: *The Road to Urban Unity*:

> In the Miami area such a sense of identification with the municipality is not altogether absent, but it has been weakened by the rapid growth that has brought new elements into the community. This influx of new settlers plus a high mobility inside the area have lessened the differentiation between the suburbs that originally existed and have in consequence reduced the communal spirit of the suburban citizenry. Of the larger municipalities, only Miami Beach, Coral Gables and Hialeah have developed sufficient character to create a civic spirit and a strong identification with the community.[6]

In fact, residents of Dade County view "Miami" and the metropolitan Dade County area as being synonymous. First Black Exh. 31 at 7.

20. In Ms. Lotz' opinion, Dade County developed a form of government unique to the United States, blurring the definitions of the words "community," "city," "municipal," "suburban" and "urban" in response to its singular social and economic conditions. First Black Exh. 31 at 2. Ms. Lotz notes that by amendment to the Florida Constitution, approved by the Dade electorate and affirmed by the Florida Supreme Court, legislative power over Dade's municipal governments was transferred from the state legislature to the Dade County Commission. This authority covered creation and abolition of cities, changes in city boundaries and transfer of city functions to the county government. First Black Exh. 31 at 2-3.

21. Ms. Lotz explains that Dade County's metropolitan government ("Metro") provides numerous essential governmental services to its citizens. Public health and education services were provided on a countywide basis even before establishment of Metro. First Black Exh. 31 at 8. Today Metro controls the transportation services available within its boundaries, including operation of Miami's airport and seaport (*Id.*), maintenance of arterial roadways (*Id.* at 11), administration of traffic regulations (*Id.* at 11), and operation of the bus system and soon-to-be opened rapid transit system. *Id.* at 11. Metro provides fire protection to all areas of the county except Miami, Miami Beach, Coral Gables and

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[6] Onyx/FBB-Lotz to SFBC 8.

Hialeah. All areas of the county are subject to the county's fire code. *Id.* at 8. Nearly all of Dade County's water and sewer is provided by the Miami Dade Water and Sewer Authority.[7] In fact, Dade County is in the process of purchasing North Miami's sewage mains and outfall.[8] The county is currently providing sewage treatment services to North Miami.[9] The Metro police force provides police protection to unincorporated Dade County and thirty-five distinct categories of law enforcement support services to the municipalities within the county.[10] Metro provides almost all social services within its boundaries, administering a $97.5 million social services budget for 1982-83.[11] Metro has assumed responsibility for managing emergency situations, such as hurricanes. First Black Exh. 31 at 10-11.

22. The municipalities located within Dade County provide only limited services to their residents. These services are garbage collection, zoning, limited police protection and enforcement of building regulations. The larger municipalities provide some recreational facilities, but Metro provides major regional park facilities to the area. First Black Exh. 31 at 12.

23. Ms. Lotz pointed out that few business, community, social or political organizations within Dade County are confined to a single city. Instead, the major private community institutions were county-wide even prior to the adoption of the Home Rule Charter. These institutions include The United Way of Dade County, The Greater Miami Jewish Federation, The Greater Miami Heart Association, The Greater Miami Hotel and Motel Association and the Greater Miami Opera Association. First Black Exh. 31 at 12-13. The major shopping malls which have been built in the last twenty years are located almost entirely in unincorporated areas and attract shoppers from all surrounding areas, both incorporated and unincorporated. First Black Exh. 31 at 7.

24. *Miami* Miami was founded by the United States Army as Fort Dallas in 1837 and was incorporated as a city in 1896. Onyx Exh. 12-A at 7. Miami is the county seat of Dade County and the center of Florida's most populous metropolitan area. Onyx Exh. 12-A at 7. It is the largest municipality in Dade County. Onyx Exh. 12-B at 16. Its population grew 19.5 percent between 1970 and 1980 to a total of 400,061 individuals. Onyx Exh. 12-B at 25.

25. Miami is governed by the two-tiered system of government unique to Metropolitan Dade County. In addition to the Metro Dade government,

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[7] Onyx-McIver to SFBC-4.

[8] Onyx/FBB-Lotz to SFBC-14(A).

[9] *Id.*

[10] Onyx/FBB-Lotz to SFBC-14(B).

[11] Onyx/FBB-Lotz to SFBC-14(H).

Miami has its own municipal government which includes a mayor, a city commission, a city attorney, a city clerk, a city manager, a fire department, a police department, a community development department, a planning department, a planning and zoning boards administrator, a trade and commerce development department, an office of grants administrator, an office of intergovernmental affairs, a building and zoning inspection department, a computers communications department, a finance department, a human resources department, a management and budget department, an office of internal audits, a convention bureau, a leisure services office, an office of information and visitors, a stadiums and marinas department, a conference center department, a building and vehicle maintenance department, a public works department, a solid waste department and a downtown development authority. Radiocentro Exh. 11 at 17. Miami operates the Coconut Grove Exhibition Center, the Miamarina and Dinner Key marinas, the Bayfront Municipal Auditorium, the Miami Stadium, the Miami Marine Stadium and the Orange Bowl, as well as the Melreese and Miami Springs Country Club golf courses and the City of Miami Convention Center, which is a part of the City of Miami/University of Miami, James L. Knight International Center. Radiocentro Exh. 11 at 18.

26. Miami is the nation's southernmost continental seaport. It is the world's largest cruise ship passenger terminal and is the home port of over one-third of the world's cruise ships. In 1981, the Port of Miami handled 2,757,374 tons of cargo, employed over 12,000 individuals and had an estimated economic impact of 1.92 billion dollars upon the greater Miami area. Radiocentro Exh. 11 at 26.

27. Miami is an international financial center. Thirty-seven Edge Act Banks have been established in Miami since 1969 and 9 of these institutions are accepting deposits and making loans in Eurodollars through international banking facilities. Twenty-five of the world's 100 largest banks are represented in Miami. As of June 1980, international deposits in Miami's banks approached 2.5 billion dollars. Over ninety percent of these international accounts are time deposits from Latin American individuals and non-financial firms. Radiocentro Exh. 11 at 23.

28. Tourism and related industries account for roughly one-third of the Miami area economy. Light manufacturing and construction trades are also significant economic activities. Onyx Exh. 12-A at 9 and 49. The Miami area has a notable health care industry, employing 23,000 licensed health care professionals and including 40 hospitals with 12,000 licensed beds. Onyx Exh. 12-A at 9. In 1975, Miami itself had 19 hospitals with 5,611 beds. Wodlinger Exh. 3A at 4.

29. The City of Miami is the economic heart of the entire South Florida region. Downtown Miami is the largest shopping district in the Miami area

with 752 stores occupying 3,000,000 square feet of building space. Onyx Exh. 12-B at 93. The following table places the magnitude of Miami's economic activity in perspective:[12]

	Gross Sales	*Taxable Sales*
Dade County	30.7	12.0
Broward County	14.9	7.3
Miami	14.8	5.5
North Miami Beach	0.8	0.43
North Miami	0.7	0.31
Miramar	0.1	0.04

30. Numerous cultural facilities are available in Miami. Specifically, Miami has 47 libraries, 6 museums, 19 art galleries, 5 theatres, a symphony orchestra and an opera company. Onyx Exh. 12-A at 9.

31. Primary and secondary education in Miami is provided by the Dade County school system, the fourth largest school system in the United States. *Id.*

North Miami Beach

32. North Miami Beach is a community in southeast Florida within Dade County encompassing an area of approximately five square miles and located ten miles northeast of Miami. Southwest Exh. 1 at 1.

33. The 1980 U. S. Census shows that North Miami Beach's population is 36,553. North Miami Beach ranks 34th among Florida's most populous cities, and there has been a 19.67 percent increase in population in the years between 1970 and 1980. As a result, North Miami Beach ranks as the sixth largest of twenty-seven communities within Dade County. The 1980 U. S. Census shows that the total male population of North Miami Beach is 16,785, total female population is 19,768 and the median age of the total population is 46.1 years. Seventeen percent, or 6,241 persons, are under the age of 18. Twenty-six percent, or 9,561 of the total population, are 65 and over. Fifty-seven percent, or 20,751, are between the ages of 18 and 64. Five percent of North Miami Beach's population is black, and 9.6 percent is of Spanish origin, including 1,277 Cubans, 514 Puerto Ricans, 108 Mexicans, and 1,628 of other Spanish origin. Southwest Exh. 1 at 1.

34. North Miami Beach has a council-city manager form of government with a mayor and six council members elected at large. It has its own police department with 93 full-time officers. Dade County fire personnel are also stationed full time in North Miami Beach. Southwest Exh. 1 at 2.

35. North Miami Beach has a variety of medical services including Parkway General Hospital and Southeastern Medical Hospital. It owns and operates seven parks on a full-time basis as well as three swimming

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[12] The figures given represent billions of dollars. This data is for the fiscal year ending June 30, 1982. Onyx Exh. 12-H at 1.

pools, twenty-two tennis courts, five ball fields, an auditorium, gymnasium, a golf course and a skating rink. There are over sixteen churches and synagogues in the community and there are over 60 chartered religious, civic, fraternal, political and business organizations. Southwest Exh. 1 at 2, 3.

36. North Miami Beach has five elementary, two middle schools, and one senior high school, and several parochial and religious schools. The public schools are also part of the Dade County school system. North Miami Beach has its own public library with over 48,000 volumes. Southwest Exh. 1 at 2.

37. North Miami Beach provides its own refuse service pickup and water and sewer service. Southwest Exh. 1 at 3. It has no broadcast stations and no newspaper. Southwest Exh. 1 at 4. However, it does have community problems. These include a significant number (26.2 percent) of older persons with special needs, high population density with a need to restrain growth, and concern with the quality of its water supply. Southwest-Cheen to Onyx/FBB at 10, 11, 12.

North Miami

38. North Miami, located in northern Dade County, Florida, was incorporated with its present boundaries in the 1950's. South Florida Exh. 12 at 9. North Miami employs a council-city manager form of government. Its four council members are elected at large, for four-year, overlapping terms. The mayor is elected at large for a two-year term. South Florida Exh. 12 at 33-34. The city government has 430 employees and operates on an annual budget exceeding $24 million. South Florida Exh. 9 at 1-2.

39. North Miami ranks as the fifth largest city in Dade County. Onyx Exh. 12-B at 25. In 1975, the city ranked 495th among the nation's most populous cities (25,000 or more), and was the 21st largest city in Florida. Wodlinger Exh. 3A at 636.

40. The 1980 population of North Miami was 42,566, reflecting a growth of 48 percent since 1960 and 22.4 percent since 1970. Of this population, 92 percent were white, 4 percent were black, and 4 percent were other categories. Hispanics represent 14.7 percent of North Miami's population. The city's 1983 population is estimated to be 45,171 and the Dade County Planning Department projects a 1985 population of 47,800 and a population of 62,000 by the year 2000. South Florida Exh. 12 at 10-11. The median age for the city's population in 1980 was 40.6 years. Wodlinger Exh. 3-B, Table 1.

41. The residents of North Miami live predominantly in single family dwellings. South Florida Exh. 9 at 5 and Exh. 11 at 1-2. In 1970, 60.1 percent of the city's year round housing units were one-unit structures and 64.7 percent of housing units were owner occupied. Wodlinger Exh. 3-A, Table 4 at 639. In 1983, North Miami had approximately 13,000 single

family units and 7,768 units in multiple dwelling structures, including 61 condominium structures with 3,737 units. Onyx Exh. 21.

42. According to 1980 U. S. Census data, 34 percent of North Miami's labor force work within the city. Onyx Exh. 6 at 6; Onyx/FBB-Lotz to SFBC 7; SFBC-Herbert to Onyx 29. North Miami's workers are predominantly employed in retail, wholesale, and light manufacturing enterprises. Other major employment sources in the city include professional and business services, transportation, communications, utilities, public administration, education, finance, insurance and real estate. South Florida Exh. 12 at 20.

43. Public schools in Florida are operated by the county in which the school is located. Wodlinger-Tagg to Onyx 8. In North Miami, there are five primary schools, a junior high school and a high school which also offers adult education programs. South Florida Exh. 12 at 29. The Bay Vista Campus of Florida International University is in North Miami. Florida International University attracts about 57 percent of its student population from southern Broward and northern Dade Counties, including North Miami, and the remainder from other areas. South Florida Exh. 10; SFBC-Foster to Rana 6.

44. North Miami's City Parks and Recreation Department supports 17 supervised and 6 non-supervised recreational facilities offering a variety of athletic, artistic, and special programs. South Florida Exh. 9 at 2-3 and Exh. 12 at 29-30. The city has its own Fine Arts Center which contains an art museum, and it sponsors an annual art festival and other special events during the year. Plays, concerts and other cultural events are available at Florida International University in the Ruth Forman Theater, on the Florida International University Bay Vista Campus. *Id.*

45. Other city departments are the Municipal Library, the Public Works Department, providing water, sewage and sanitation services, the Police Department, with a 90 member police force, a Community Planning and Development Department, and departments for administration, personnel and finance. South Florida Exh. 9 at 2-3.

46. Lay-boards and committees which advise North Miami's mayor and the city council include: Armory Board, Planning Commission, Downtown Redevelopment Board, Board of Adjustment, Board of Architects, Charter Board, Library Board, Winternational Committee, Sculpture Committee, Senior Citizens Advisory Board, Parks & Recreation Commission, Youth Opportunity Board, Energy Advisory Board, Board of Trustees of North Miami Museum, Handicapped Interest Committee, Hall of Fame Selection Committee, Joint Committee for Viable Biscayne Blvd., Florida International University, North Miami Community Advisory Committee, and Mayor's Council of Physical Fitness and Sports. South Florida Exh. 9 at 1-2 and Exh. 12 at 32-34.

47. Medical care in the city is provided by North Miami General Hospital, which has 359 beds and a staff of over 350 physicians plus 800 other employees. South Florida Exh. 12 at 30; Exh. 11 at 4. About 3,500 businesses are located in North Miami. SFBC-Cuson to Onyx 14 and 40. In the 1981-82 fiscal year, sales enterprises in the city generated about $700 million in gross sales. Onyx Exh. 12-H. In 1977 the city had 83 manufacturing establishments and 567 retail stores. South Florida Exh. 12 at 19, 48. North Miami has developed a substantial industry in motion pictures, television programming and sound recording production. Several major motion pictures and recording stars have relied on facilities available in North Miami. South Florida Exh. 9 at 6, Exh. 11 at 3 and Exh. 12 at 19. The city has its own Chamber of Commerce with about 200 members. South Florida Exh. 11 at 4, 6-14; SFBC-Cuson to Onyx 5 and 6.

48. In an effort to broaden community awareness and fill a gap in communication to its citizenry, North Miami has developed its own newsletter, entitled *Progress Line*, which reports on local events and seeks citizen opinion on local issues. South Florida Exh. 12 at 24, 55-58.

49. The studios of non-commercial Station WPBT-TV are located in North Miami. WPBT-TV is licensed to Miami and is designed to respond to the needs of the regional area. *Id.* at 25.

Miramar

50. The city of Miramar is situated in Broward County which is located in southeast Florida immediately north of Dade County. Miramar has a total land area of 31.2 square miles making it the third largest city in area in Florida. Wodlinger Exh. 3A at 3; Wodlinger Exh. 4 at 4.

51. However, seventy percent of the city is adjacent to the Everglades Swamp. Development in the area is restricted because of periods of extensive flooding and severe overdrainage. South Florida Water Management District, *Permitting Information Manual*, Volume IV at A-22 - A-26.

52. Miramar is situated in U. S. Bureau of the Census Standard Metropolitan Statistical Area (county code number) 2680 along with such other Broward County cities as Pompano Beach, Margate, Hollywood, Lauderhill, and Fort Lauderdale.[13]

53. According to 1980 U. S. Census data, Miramar had a total population of 32,813 persons. Of this number, 32,077 were white, 283 were black, 25 were Indian, 170 were of Asian background and 2,564 were of Spanish origin. Of the total 1980 population, 5.8 percent were under five years of age, 74.1 percent were 18 years and over, and 11.4 percent were 65 years and over. The median age was 33.0. According to 1980 U. S.

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[13] Miami, Coral Gables, Hialeah, Miami Beach and North Miami are all situated in U. S. Bureau of Census Standard Metropolitan Statistical Area (code number) 5000.

Census data, there were 11,647 households and 9,431 families in Miramar. Wodlinger Exh. 3-B at 2.

54. Based on U. S. Census data, the 1970 population of Miramar was 23,977 and the 1975 population 30,231. The population change from 1960 to 1970 was 337.5 percent. The population change from 1970 to 1975 was 26 percent. Wodlinger Exh. 3-A at 2.

55. About 28 percent of Miramar's employed residents work in retail or wholesale trade endeavors (SFBC-Herbert to Onyx 29) and 21 percent of its employed residents work within the city. Onyx Exh. 6 at 6. In 1972 Miramar had 156 retail establishments with $27 million in total sales. Wodlinger Exh. 3-A at 644. Gross sales for all business located in Miramar in 1982 were $99.7 million. Onyx Exh. 12-H.

56. Miramar was incorporated in 1955. It has a mayor-commission form of government with a mayor and five commission members all of whom are elected for four year terms. The mayor administers policies established by the city commission which are based upon recommendations of the mayor and various advisory boards, including the Civil Service Board, Zoning Board, Planning Board, Safety Council Recreation Advisory Board and Industrial Board (Ad Hoc). Wodlinger Exh. 4 at 3 and 4.

57. Miramar owns its own utilities (water, sewer and sanitation) and has its own fire and police departments. Wodlinger Exh. 4 at 4, 6, 11, 12 and 13.

58. Miramar has one high school, one middle school and four elementary schools which are all part of the Broward County school system. Wodlinger Exh. 4 at 17; Wodlinger-Tagg to Onyx/FBB 8. There are also three private schools in Miramar. Wodlinger Exh. 4 at 17.

59. There are eleven churches in Miramar and approximately twenty-eight service and social interest groups, including the Lions Club, Knights of Columbus, Optimists Club, Miramar Association for Community Services and the Senior Citizens of Greater Miramar. Wodlinger Exh. 4 at 15. The Miramar Chamber of Commerce is organized with nearby Pembroke Pines and is known as the Miramar/Pembroke Pines Chamber of Commerce. Wodlinger-Tagg to Onyx/FBB 11.

60. There are three shopping centers in Miramar. The nearest major department stores are located in nearby Hollywood, Florida, which is also in Broward County. Wodlinger-Tagg to Onyx/FBB 3 at 4 and 5.

61. Miramar operates and maintains eleven public parks and the city's recreation department provides various recreational programs and other community activities for Miramar residents. Wodlinger Exh. 4 at 5 and 7.

62. The North Perry Airport is located adjacent to Miramar's boundaries at the north side of Pembroke Road. Wodlinger-Tagg to Onyx/FBB 10.

63. Miramar's 1983 proposed city budget, administered by the city Finance Department, was $6,746,845. Wodlinger Exh. 4 at 9. City taxes are collected by Broward County. City taxes in all cities in Florida are collected by the various counties on behalf of the cities located within their respective county boundaries. Wodlinger-Tagg to Onyx/FBB 5.

64. No daily or weekly newspaper is published in Miramar. The *Mirror*, a weekly newspaper published in Sunrise, Florida, provides weekly coverage of events in Miramar. Newspapers, such as the *Miami Herald, Fort Lauderdale News* and *Sun Tattler* of Hollywood, Florida, cover events in Miramar from time to time. Wodlinger-Tagg to Rana 1.

First Black Broadcasters' Representations to the Commission About the Candleabra Antenna Site

65. First Black Broadcasters, South Florida Broadcasting Company, Rana Broadcasting Company, Onyx Broadcasting of Miami, Inc., Constance J. Wodlinger, and former applicant, William H. Hernstadt, propose, or proposed, to locate their antennas at a site owned by Candleabra, Inc. First Black Broadcasters represented to the Commission on January 7, 1983 in petitions to enlarge that the other parties did not have reasonable assurance that the site would be available to them because they, unlike First Black Broadcasters, did not have a formal option agreement with Candleabra. First Black Broadcasters also claimed that Candleabra had granted nonbroadcast third parties the right to use its antenna if First Black Broadcasters did not exercise its option.

66. In early 1981, Dallas Manuel, a First Black Broadcasters' principal, George Greene, the husband of Elaine Greene, who is First Black Broadcasters largest controlling stockholder, and Robert Speiser, who has lent First Black Broadcasters money to pursue its application,[14] had a number of meetings and conversations with Ronald Crider, a principal of Candleabra, Inc., regarding the use of antenna space on the Candleabra tower by First Black Broadcasters. First Black Exh. 3 at 4-5. These negotiations culminated, on April 15, 1981, with the signing of an

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[14] Robert Speiser has been available to assist First Black Broadcasters in the prosecution of its application. Tr. 473-74. First Black Broadcasters has gone to Mr. Speiser for funds on several occasions. Elaine Greene contacted Mr. Speiser personally when First Black Broadcasters was behind in payments to Candleabra for its option. Tr. 486-87. Mr. Speiser paid the initial deposits to secure the Candleabra site for First Black Broadcasters, approximately $30,000. Tr. 480. At that time, First Black Broadcasters' principals had invested only $6,000 - $7,000 of their own money in their application. Tr. 479. In fact, Mr. Speiser had often independently spoken with Candleabra, Inc. on behalf of First Black Broadcasters. Tr. 380. In addition, Mr. Speiser occasionally called Mary Albert, counsel for First Black Broadcasters, to see how First Black Broadcasters' application was proceeding. Ms. Albert believed Mr. Speiser to be a close friend of the Greene's and was under the impression that he was calling on First Black Broadcasters' behalf. Tr. 441, 443-45.

agreement between First Black Broadcasters and Candleabra providing for payments securing an option for tower space on the Candleabra tower. First Black Exh. 9 at 7.

67. In March 1981, Mark Wodlinger contacted Ronald Crider on behalf of Constance J. Wodlinger and was told that space would be available on the Candleabra tower for a new FM station and that a formal option for that space could be negotiated at a later time. South Florida Exh. 13-D at 1. In addition, on April 28, 1981, James E. Griffin, Jr. contacted Mr. Crider on behalf of Onyx. Mr. Crider told Mr. Griffin that, for payment of a fee, space could be made available on the Candleabra tower. First Black Exh. 18 at 11. This state of affairs continued and, in May 1982, Mr. Crider indicated to Rana that Candleabra was agreeable to negotiate for the space which was then optioned to First Black Broadcasters. South Florida Exh. 13-E at 1. On June 15, 1982, Candleabra transmitted a draft option agreement to Rana's lawyers. The draft agreement contemplated that Rana, if it prevailed in the proceeding, would reimburse First Black Broadcasters for the payments made by First Black Broadcasters to secure the tower space. South Florida Exh. 13-E at 3-5.

68. In mid-October 1982, Robert Speiser and Ronald Crider contacted Mary Albert, counsel for First Black Broadcasters. First Black Exh. 4 at 1. During the course of a telephone conversation, Mr. Speiser introduced Mr. Crider to Ms. Albert. Tr. 439. Mr. Crider told Ms. Albert that First Black Broadcasters was the only applicant with an agreement to use the Candleabra tower. First Black Exh. 4. He mentioned that Constance Wodlinger had previously contacted him regarding the availability of tower space. Tr. 442. Then, either Mr. Crider or Mr. Speiser suggested that Mr. Crider provide the FCC with an affidavit to the effect that the tower site was unavailable to other applicants. Ms. Albert suggested that the Commission might presume that in the event that First Black Broadcasters did not prevail in the proceeding, its site would be available to the prevailing applicant. Mr. Crider, however, told Ms. Albert that, in the event First Black Broadcasters did not get a grant, there were contingent leases for the site. Mr. Crider then gave Ms. Albert a list of file numbers for applicants specifying the Candleabra site and requested that she identify the applicants corresponding to those file numbers. First Black Exh. 4.

69. On October 19, 1982, Ms. Albert sent Mr. Crider a draft affidavit and a list of applicants corresponding to the file numbers given by Mr. Crider in the previous conversation. *Id.* The draft affidavit identified William Hernstadt as one of the applicants who was not authorized to use the Candleabra tower. Tr. 443. The same day, Ms. Albert sent Elaine Greene a letter concerning the conversation with Mr. Speiser and Mr.

Crider and containing Mr. Crider's draft affidavit. South Florida Exh. 13-H at 70; Tr. 459.

70. In mid-November 1982, Ms. Albert called Mr. Crider to determine why he had not returned the draft affidavit. On November 29, 1982, Mr. Crider returned Ms. Albert's call. He indicated that he had lost the draft affidavit. Ms. Albert sent him another copy of the affidavit. First Black Exh. 4 at 2-3. Shortly thereafter, Mr. Crider telephoned Ms. Albert and informed her that First Black Broadcasters was several months in arrears on its option payment for the Candleabra site. He said that if payments were not brought current, the option would be terminated. Ms. Albert suggested to Mr. Crider that he refrain from executing the affidavit until First Black Broadcasters became current in its payments. First Black Exh. 4 at 3.

71. On December 6 and 7, 1982, Ronald Crider wrote letters to several applicants in this proceeding including William Hernstadt, Constance J. Wodlinger, Onyx, South Florida Broadcasting and Rana, in which he explained that they had no reasonable assurance of obtaining space on the Candleabra tower. The recipients of the letters were invited to contact Mr. Crider if they had any questions concerning the letter. South Florida Exh. 13-F at 42; Tr. 396-97. Subsequently, on December 13, 1982, James E. Griffin, Jr., of Onyx contacted Mr. Crider and was informed that space could be made available on a tower to be built 60 feet from the existing Candleabra tower. First Black Exh. 7 at 2. On December 29, 1982, counsel for Ms. Wodlinger also contacted Mr. Crider and was informed that Candleabra would provide an option for tower space for a payment of $1,000.00 per month. First Black Exh. 16 at 50-51. In addition, sometime in the period between early December 1982 and early January 1983, Mr. Crider negotiated an agreement in principle to provide William Hernstadt's proposed station with a position on the Candleabra tower. Tr. 362-63. During this period, Mr. Crider informed Robert Speiser of his agreement with Mr. Hernstadt. Mr. Crider considered this action tantamount to informing First Black Broadcasters. Tr. 363-64.

72. On January 3, 1983, Mr. Crider executed an affidavit to the effect that Ms. Wodlinger, South Florida Broadcasters, Onyx and Rana had specified the Candleabra site but had no agreement with Candleabra to lease space. He averred that even if First Black Broadcasters did not obtain a construction permit, Candleabra could not give assurance that space would be available on the tower because of lease arrangements with other parties. First Black Exh. 9 at 7-8. Prior to executing this affidavit, Mr. Crider informed Ms. Albert of changes in the affidavit regarding William Hernstadt. He told Ms. Albert that Candleabra had reached an agreement in principle with Mr. Hernstadt. Tr. 365-66; Tr. 372. Ms. Albert testified that she did not discuss with Mr. Crider the deletion of Mr.

Hernstadt's name in the final affidavit but she did notice the modification and wondered why Mr. Hernstadt's name had been removed. Tr. 444, 447, 459-62.

73. On January 6, 1983, Onyx filed an amendment to its application containing Mr. Crider's December 7, 1982 letter and the substance of Mr. Griffin's December 13, 1982 conversation with Mr. Crider. Subsequently, on January 7, 1983 First Black Broadcasters filed petitions to enlarge against Ms. Wodlinger, Rana, Onyx and South Florida Broadcasting. These petitions, which were authorized by Elaine Greene (First Black Exh. 2 at 7), alleged that, by virtue of First Black Broadcasters' option for space in the Candleabra tower and the contingent options for First Black Broadcasters' space, the other parties in the proceeding could not have reasonable assurance that the tower was available. The petitions further accused the applicants of lacking candor in specifying their antenna sites, claiming that the applicants had not even inquired into the availability of the site. Prior to the filing of the January 7 petitions to enlarge, First Black Broadcasters did not obtain information as to the identity of the third parties with purported contingent option agreements, nor did it obtain documentation on the terms of such agreements.[15] Tr. 456-57.

74. Counsel for Ms. Wodlinger contacted Ronald Crider on January 14, 1983 and confirmed the availability of tower space for Ms. Wodlinger upon payment of $1,000.00 per month option fee. First Black Exh. 16 at 50-51. Next on January 20, 1983, Ms. Wodlinger filed an opposition to First Black Broadcasters' petition to enlarge issues. Ms. Wodlinger's opposition contained:

(a) An affidavit from Mark Wodlinger concerning the unavailability of the Candleabra site;

(b) Mr. Crider's December 7, 1982 letter to Ms. Wodlinger concerning the unavailability of the Candleabra site; and

(c) An affidavit from Ms. Wodlinger's counsel relating the substance of his conversation with Mr. Crider on December 29, 1982 and January 14, 1983. First Black Exh. 16 at 50-51, 61.

75. First Black Broadcasters replied to Ms. Wodlinger's opposition to petition to enlarge issues on February 1, 1983 in a pleading containing an affidavit from Ronald Crider. Mr. Crider's affidavit states that he told Ms. Wodlinger's counsel that there was no space on the Candleabra tower but that the tower might be reconfigured to accommodate an antenna. Mr.

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[15] Mr. Crider admitted that none of Candleabra's agreements with the third parties was expressly contingent upon the grant or denial of First Black Broadcasters' application, (First Black Exh. 33 at 123-25 and Tr. 394-96) and that a contingency was not necessary because, at the time First Black Broadcasters' January 7 petitions were filed, or very shortly thereafter, the two third parties were already on the tower. Tr. 393-96; First Black Exh. 53 at 119.

Crider's affidavit also states that space on a second tower might be available, but there is no guarantee that a second tower would be built. First Black Exh. 17 at 9-10. The next day Rana and Onyx filed oppositions to First Black Broadcasters' petitions to enlarge issues. The Onyx opposition contains an affidavit of James E. Griffin regarding Onyx's April 28, 1981 contacts with Mr. Crider. First Black Exh. 18 at 11. The Rana opposition included the June 15, 1982 draft option agreement from Candleabra, which contemplated reimbursing First Black Broadcasters in the event Rana prevailed in the proceeding. First Black Exh. 19 at 13.

76. On May 25, 1983, Dallas Manuel stated that, from the inception of First Black Broadcasters' agreement with Candleabra, First Black Broadcasters had the power to negotiate for antenna space with any applicant prevailing in this proceeding. Tr. 588-89. Further, Ronald Crider told Mr. Manuel that Candleabra would make its site available to others if they met its terms. TR 558. Mr. Manuel discussed the possibility of negotiating with a prevailing party for tower space with Elaine Greene. Tr 588. Manuel and Greene both received copies of the pleadings filed in this proceeding from their counsel. TR. 470-71.

77. In July of 1983, First Black Broadcasters renewed its efforts to obtain site availability issues against South Florida Broadcasting, Wodlinger, Rana and Onyx. Again, First Black Broadcasters relied on the statements of Mr. Crider to suggest that the applicants' specified antenna site was not available. First Black Broadcasters' petitions to enlarge issues were again rejected. *See Memorandum Opinion and Order*, FCC 83M-2880, released August 29, 1983.

78. In addition to having a leasing agreement with Candleabra, First Black Broadcasters intended to obtain its equipment from an equipment supply business called Broadcast Automation Associates, which is owned by Mr. Crider of Candleabra. Tr. 366-67. First Black Broadcasters' application included an equipment proposal in the amount of approximately $400,000.00 to $500,000.00. Tr. 367. Mr. Crider testified that Broadcast Automation Associates no longer had an obligation to First Black Broadcasters because the equipment quotation in First Black Broadcasters' application was a proposal good only for 30 days. Tr. 411-12. Moreover, since August 1981, Broadcast Automation Associates has not actively sold broadcast equipment. Therefore, Mr. Crider did not believe he could sell such equipment to First Black Broadcasters although he might provide the equipment at cost. Tr. 412-14.

Rana's Reporting of Garth Reeves' Option and Broadcast Interests

79. Rana first reported to the Commission in a Statement for the Record, dated May 18, 1983, that an option for 15 percent ownership in Rana had been extended to Garth Reeves by Michael Benages. A petition

for leave to amend concerning these facts was filed on May 27, 1983. The option agreement was entered into in April or early May 1983 in consideration for Mr. Reeves' work in preparing evidence on the §307(b) issue. Rana and South Florida Stipulation of October 12, 1983;[16] Reeves' Dep. at 12-13. Mr. Reeves' intention to acquire Rana's stock, if Rana is granted a construction permit, was first revealed in September 1983. Reeves' Dep. at 19-20.

80. Rana did not report Mr. Reeves' interests in broadcast stations until July 15, 1983, after South Florida filed a petition to enlarge issues on June 20, 1983. Rana's explanation for this reporting delinquency is that it did not ask Mr. Reeves about ownership interests in mass communications media, and Mr. Reeves did not volunteer this information to Rana. Rana and South Florida Stipulation of October 12, 1983.

The Availability of the Antenna Sites Proposed by Radiocentro Broadcasting and Southwest Radio Enterprises

81. The Mass Media Bureau pointed out in the *Hearing Designation Order* at par. 7 that WAIA-FM, Miami, Florida had written to the Commission on November 17, 1981 that it had discontinued the use of a diplexer on its antenna on February 15, 1981. The tower on which WAIA-FM is located is owned by WPBT-TV, Channel 2, Miami. WAIA-FM had previously shared its antenna with WMJX-FM, the station that was formerly licensed to use Channel 243. WMJX-FM's license was not renewed which ended the shared antenna arrangement it had with WAIA-FM. Radiocentro Exh. 10. Radiocentro and Southwest Radio, applicants for Channel 243, both proposed to use the WPBT-TV tower as had WMJX-FM. However, the Mass Media Bureau concluded, in light of WAIA-FM's letter, that a question existed about the availability of the WPBT-TV tower and it designated site availability issues against Radiocentro and Southwest.

82. Radiocentro, after designation of the issue on October 21, 1982, waited until April 28, 1983 before writing to WAIA-FM to inquire whether it would be willing to resume the diplex arrangement. Radiocentro Exh. 10 at 2-3. WAIA-FM stated that it would not do so. *Id.* The President of Radiocentro, Salvador Lew, stated that Radiocentro does not have an antenna site at this time. Tr. 306.

83. Southwest Radio, on the other hand, proposes to designate a new site. It petitioned for leave to amend on May 3, 1983. Southwest Radio, unlike Radiocentro, did not propose diplexing with WAIA-FM as WMJX formerly did; instead it proposed to locate on a different part of WPBT-

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[16] Motion for acceptance of stipulation in lieu of hearing, filed October 12, 1983 by Rana Broadcasting, Inc. and South Florida Broadcasting, Inc. The stipulation was accepted on November 7, 1983, *Order*, FCC 83M-4090, released November 8, 1983.

TV's tower. Before determining whether good cause exists for moving its site, Southwest Radio is required to show it had reasonable assurance that it could use the WPBT-TV tower. In June, 1981, Southwest's consulting engineer, Ralph Dippel, spoke by telephone to someone at WPBT, who he believed held the necessary authority to authorize Southwest's use of the WPBT tower. Southwest Exh. 4. Mr. Dippel's partner, Julius Cohen, told Southwest that he had spoken to WPBT's chief engineer regarding the use of the tower and the station's engineer indicated it would be available. Southwest Exh. 3. David Meyers, Southwest's attorney, sent a letter, on June 29, 1981, to the general manager of WPBT-TV confirming Mr. Dippel's understanding that the site would be available for leasing. Southwest Exh. 5. Mr. Meyers received no response from WPBT-TV that the tower would not be available. *Id.* Mr. Meyers later learned that his confirming letter had been misplaced by WPBT-TV. Southwest Exh. 5 at 2. WPBT-TV has provided the space designated by Southwest to another user and the tower is not available.

Comparative Factors

Diversification of Ownership and Control of the Media of Mass Communications

84. *South Florida Broadcasting* holds no mass media interests. South Florida Exh. 1. Francisco (Frank) Soler is a vice president, director and 9 percent stockholder of South Florida Broadcasting. South Florida Exh. 2 and Exh. 5. Mr. Soler is the founder, president, chief executive officer and majority owner of Quintus Communications Group, Inc. *Id.* Quintus publishes *Miami Mensual,* a monthly magazine for Hispanics, with a total readership of 70,000, approximately 80 percent of which is in the South Florida area. South Florida Exh. 2. *Miami Mensual* publishes editorials every month written by Mr. Soler and commentary on the problems and needs of the South Florida area. Tr. 244, 245.

85. Maria Elena Torano is a director and 1 percent stockholder in South Florida Broadcasting. South Florida Exhs. 2 and 8. Ms. Torano has a 5.56 percent voting shareholder interest in Los Cerezos Television Company, Inc., licensee of low power experimental Translator Station KA2KEH operating on Channel 56 in Washington, D. C. South Florida Exhs. 2 and 8; Tr. 427, 433. Los Cerezos is also the permittee of Television Broadcast Translator K66BV, Detroit, Michigan. South Florida Exh. 8. In addition, Los Cerezos has received Commission approval for the assignment to it of Television Broadcast Translator W14AA, Arlington, Virginia. *Id.*

86. Judith F. Hernstadt is the beneficial owner of 20 shares of stock (20 percent) in South Florida Broadcasting. South Florida Exhs. 1 and 2. Ms. Hernstadt is vice president and holds a 20 percent ownership interest

in Hernstadt Broadcasting Corporation, licensee of WKAT-AM, Miami Beach, Florida, *Id.*, Tr. 144. William H. Hernstadt, formerly a competing applicant in this proceeding, is the spouse of Judith Hernstadt and president, treasurer, director and 80 percent shareholder of Hernstadt Broadcasting Company. South Florida Exh. 2. Ms. Hernstadt has stated that she will divest herself of her 20 percent ownership interest in WKAT if the application of South Florida Broadcasting is granted by the Commission. *Id.* Mr. Hernstadt has made no commitment to divest his interest in WKAT if the application of South Florida is granted.

87. *Radiocentro* is a wholly-owned subsidiary of Villa Broadcasting Company, the licensee of standard broadcast station WRHC, Coral Gables, Florida. Radiocentro Exhs. 1 and 2. WRHC operates with 10 kilowatts daytime, and 500 watts during nighttime hours. Radiocentro Exh. 2. Radiocentro's proposed FM station will place a 1 mV/m signal over WRHC's community of Coral Gables. Joint Exh. 1 at 7. other than WRHC, neither Radiocentro, Villa Broadcasting Company, nor any of their officers, directors and stockholders have any interests in any media of mass communications. Radiocentro Exh. 2.

88. *First Black Broadcasters* and its principals have no interest in any media of mass communications. First Black Exh. 1.

89. *Constance J. Wodlinger* is an individual applicant. Wodlinger Exh. 1. Ms. Wodlinger is president, treasurer, director and 50 percent shareholder of Wodlinger Broadcasting Company, licensee of KCLO-AM and KZZC-FM, Levenworth, Kansas. *Id.* Ms. Wodlinger is currently serving as station manager of the Levenworth stations. *Id.* Mark L. Wodlinger, Ms. Wodlinger's spouse, is chairman of the board, secretary, director and 50 percent shareholder of Wodlinger Broadcasting Company. *Id.*

90. *Onyx* holds no other mass media interests. Onyx Exhs. 1, 2, and 3. Dwight A. Lauderdale, who is an officer, director and 30 percent shareholder of Onyx, owns five shares out of a total of 9,092,000 publicly traded shares of Taft Broadcasting Company. Onyx Exh. 2. Harold Martin, who is an officer, director and 40 percent shareholder of Onyx, owns nine shares out of 28,340,000 publicly traded shares of Cox Broadcasting Corporation. Tr. 765.

91. *Rana Broadcasting Company, Inc.* holds no other mass media interests. Rana Exh. 2. Michael A. Benages, who is secretary/treasurer, director and 80 percent owner of Rana, has other broadcast interests, as does Alan Wheeler, Rana's President, director and 20 percent shareholder. Rana Exhs. 1 and 2. Mr. Benages and Mr. Wheeler have committed themselves to divesting and severing all their other broadcast interests prior to commencement of program test authority if their application for Rana is granted. Rana Exh. 2 at 1.

92. At the hearing it was disclosed that Garth Reeves will acquire 15 percent of the stock of Rana from Michael Benages. Rana-South Florida Stipulation in lieu of Hearing, filed on October 12, 1983, Tr. 818. Reeves is editor, publisher, and 100 percent owner of *the Miami Times*, a weekly newspaper published in Miami with a circulation of 27,695. He owns 5 percent of the voting stock of Miami/South Florida, Inc., which owns a monthly magazine published in Miami entitled *Miami/South Florida.* Reeves also owns 34.25 percent of the voting stock of Riviera Communications, Inc., licensee of standard broadcast station WPOM, Riviera Beach, Florida and is a director of that corporation. Reeves is president, secretary/treasurer, a director, and 51 percent owner of Riviera Communications – Sanibel, Inc., an applicant for a new FM station at Sanibel, Florida (File #BPH-830714A0). He presently holds a contract to acquire an ownership interest in the permittee of WHFL, a new FM station in Havana, Florida. Further, Reeves is a director of Broadcast Enterprises National, Inc. (BENI) and owner of 3.7 percent of that company's Class A common stock. BENI holds a warrant to purchase 20 percent of the common stock of KLM Communications, Inc., licensee of standard broadcast station WCIN, Cincinnati, Ohio. BENI is the parent corporation of the following:

BENI of Jacksonville, Inc., licensee of standard broadcast station WPDQ, Jacksonville, Florida.

Atlanta OK Broadcasting Co., Inc., licensee of standard broadcast station WAOK, Atlanta, Georgia.

BENI of Baltimore, Inc., licensee of standard broadcast station WITH, Baltimore, Maryland.

BENI Broadcasting Associates, Inc., licensee of FM Station WBLZ, Hamilton, Ohio.

BENI Broadcasting of Pittsburgh, Inc., licensee of standard broadcast station WJAS, Pittsburgh, Pennsylvania.

BENI of Indiana, Inc., licensee of FM station WTLC, Indianapolis, Indiana.

BENI Broadcasting of Rochester, Inc., licensee of WHEC-TV, Rochester, New York. BENI of Rochester, Inc. has filed an application to assign its license to Viacom Broadcasting, Inc. (File No. BAL-830826KG).

93. BENI is also the parent corporation of the soon to be formed Benida Inc. Viacom Broadcasting, Inc., licensee of standard broadcast stations WDIA, Memphis, Tennessee, and KDIA, Oakland, California, has filed an application to assign those licenses to Benidia, Inc. (File Nos. BAL-830826KG and BAL-830826KI, respectively). Rana-South Florida Stipulation at 2-4.

94. *Southwest* is a wholly-owned subsidiary of Southwest Florida Enterprises, Inc. Southwest, Southwest Florida Enterprises, and its principals have no mass media interests. Southwest Exh. 2.

Best Practicable Service to the Public—Integration of Ownership and Management

95. *South Florida Broadcasting* is a corporation owned by the following individuals in the manner indicated:

Name	*Position*	*% Shares Owned*	*% Shares Voted*
George Feldenkreis	Pres., Treasurer, Dir.	43	43
Elaine Bloom	Vice Pres., Sec., Dir.	15	31
Frank Soler	Vice Pres., Dir.	9	9
Muriel Russell	Vice Pres., Dir.	11	9
Francena Thomas	Vice Pres., Dir.	1	7
Maria Elena Torano	Director		1
Judith Hernstadt	–	20	0
		100%	100%

South Florida Exh. 1 at 2.

96. All of South Florida Broadcasting's shareholders are parties to a shareholder agreement, which was entered into on April 23, 1981, and was subsequently amended on July 22, 1981. Application of South Florida Broadcasting and First Amendment, filed September 15, 1981. Elaine Bloom and Judith Hernstadt are also parties to a Voting Trust Agreement dated April 10, 1981 and subsequently amended on May 28, 1981, July 22, 1981, and December 9, 1981. South Florida Broadcasting Amendments filed May 27, 1981, September 15, 1981, and December 11, 1981. Pursuant to this amended Voting Trust Agreement, Elaine Bloom, as trustee, votes 18 of the shares owned by Judith Hernstadt; and Francena Thomas, as trustee, votes the other 2 shares owned by Judith Hernstadt. South Florida Exh. 1; Tr. 189-90. On July 22, 1981, a Second Voting Trust Agreement between Judith Hernstadt, Elaine Bloom, Muriel Russell and Francena Thomas was entered into. South Florida Broadcasting Amendment filed September 15, 1981. Francena Thomas, as trustee, votes two shares of stock owned by Elaine Bloom and two shares of stock owned by Muriel Russell, as well as the two shares owned by Judith Hernstadt. South Florida Exh. 1; Tr. 249. The trustees, under the agreements, have all of the rights of ownership, including the right to vote, but excepting the right to sell or transfer the stock to a third party. Agreements as amended.

97. Under the terms of the Voting Trust Agreement, as amended, between Judith Hernstadt and Elaine Bloom, there is an Optional Termination provision, Section 7.02b, as amended December 9, 1981. Third Amendment. This section allows Judith Hernstadt to terminate the Voting Trust if she and her husband have disposed of their interests in Hernstadt Broadcasting Corporation or Hernstadt Broadcasting Corporation no longer has any interest in a Commission license. *Id.* Ms. Hernstadt has within her control the ability to terminate the trust and exercise her vote

of the 20 shares of stock she owns. *Id.* Tr. 192-95. In addition, Section 2.04 of the Voting Trust Agreement between Ms. Hernstadt and Ms. Bloom provides that upon the death, resignation, removal or incapacity of Ms. Bloom as trustee, the trust automatically terminates. Voting Trust Agreement dated April 10, 1981. Ms. Bloom, by merely resigning, may terminate the Voting Trust. *Id.* This same automatic termination exists in the Voting Trust Agreement between Elaine Bloom, Judith Hernstadt, Muriel Russell and Francena Thomas. Voting Trust Agreement dated July 22, 1981.

98. Elaine Bloom, who is a white female, proposes to work full time at the station as public affairs director. South Florida Exh. 3, Tr. 143. Ms. Bloom resides in North Miami Beach, Florida, which is within the proposed coverage area of South Florida's proposed station. South Florida Exh. 3. Ms. Bloom has had some broadcast experience. *Id.* She hosted, directed, and produced a radio interview program from 1972-1976 at WIOD-AM, Miami; she also hosted and produced a weekly public affairs program for WPBT-TV during 1977; and from 1979-1981, she was director of public affairs and vice president for public affairs at WKAT-AM, Miami Beach. South Florida Exh. 3. Since 1981, Ms. Bloom has been self-employed as a government relations consultant but she has indicated that she will curtail the time spent as a consultant if South Florida Broadcasting's application is granted. *Id.*, Tr. 196-97. Ms. Bloom has participated in civic affairs in the Miami area but not specifically in North Miami. South Florida Exh. 3. She has been active in the Dade County Local Government Study Commission, the Dade County Library Board, the Dade County Commission on the Status of Women, the Dade County Manpower Planning Commission, the Greater Miami Section of the National Council of Jewish Women, the Florida International University Institute for Women, The Florida Philharmonic Board of Directors, the Board of Trustees of the Florida International University Foundation, and the Greater Miami Chamber of Commerce. South Florida Exh. 3 at 5-6.

99. George Feldenkreis, who is president, treasurer, director and 43 percent shareholder of South Florida Broadcasting, proposes to work twenty hours per week at the station as financial director. South Florida Exh. 4. He will be primarily responsible for all financial matters involving the licensee corporation, including budgeting, financing, tax, purchase and lease arrangements and investment decisions. *Id.*, Tr. 220. Mr. Feldenkreis resides in North Miami, Florida, although he now travels approximately 12 weeks per year on business and would continue to travel 6 weeks per year on business if South Florida Broadcasting's application is granted. South Florida Exh. 4, Tr. 222-26. His only broadcast experience was at a student radio station over 30 years ago in Havana, Cuba. South Florida Exh. 4. Mr. Feldenkreis has been involved in some civic affairs in

the Miami area but not in North Miami. *Id.*, Tr. 228-32. For example, Mr. Feldenkreis has been active in Hispanic Heritage Week, local fund-raising for the American Heart Association, the Hebrew Academy of Miami, and the Combined Jewish Appeal as Cuban Campaign Committee Chairman and as a board member. *Id.* at 4-5.

100. Frank Soler is vice president, director and 9 percent shareholder of South Florida. He will work part-time, twenty hours per week, at the proposed station as news and music programming director. South Florida Exh. 5, Tr. 234-35. Mr. Soler is Hispanic and resides in Miami, Florida. South Florida Exh. 5. He has some broadcasting experience, having worked as Latin American Editor for WCKT-TV, Miami from 1965 to 1968. *Id.* Mr. Soler also was a director of non-commercial WPBT-TV, Miami from 1979 to 1982. *Id.* He has participated in civic affairs in the Miami area but not in North Miami. *Id.* Mr. Soler has been active in the Downtown Center for Fine Arts, South Florida Historical Association, Facts About Cuban Exiles, Greater Miami United, Greater Miami Chamber of Commerce and many other organizations. *Id.*

101. Francena Thomas, South Florida Broadcasting's vice president, director, and 1 percent shareholder, votes six additional shares pursuant to the Voting Trust Agreement. South Florida Broadcasting Exh. 6, Tr. 249. Ms. Thomas is a block female and resides in Miami, Florida. South Florida Exh. 6. She plans to work part-time, twenty hours per week, at the proposed station as minority programming coordinator, working to produce non-entertainment and public service programming of interest to the black community. *Id.* Ms. Thomas has some broadcast experience. *Id.* She has served as host and producer on various public affairs programs at station WMBM-AM during 1976-77 and during 1981-1982; at WNWS-AM, South Miami since 1982; and WCKT-TV, Miami. her other broadcast activities will be terminated if South Florida is granted a construction permit. *Id.* She will, however, continue her full-time job at Florida International University. *Id.* Ms. Thomas has participated in some civic activities in the Miami area but not in North Miami. *Id.* For example, she has been actively involved in the Miami Alumnae Chapter of Delta Sigma Theta, the Dade County Human Relations Board, Greater Miami United, and the Mayor's Blue Ribbon Panel on the Overtown Situation. *Id.* at 5-6.

102. Muriel Russell, who is vice president, director and 11 percent shareholder, has placed two of her votes in trust to be voted by Francena Thomas. South Florida Exh. 7, Tr. 280. Ms. Russell is a white female who resides in Miami, Florida. South Florida Exh. 7, Tr. 278-79. Ms. Russell proposes to work part-time, twenty hours per week, at the station as marketing director with primary responsibility for sales research, special sales campaigns and developing relationships with the station's advertisers and with advertising agencies. South Florida Exh. 7. Ms. Russell had

radio experience as a child actor over forty years ago. South Florida Exh. 7, Tr. 276-77. She has participated in some civic affairs in the Miami area but not in North Miami. South Florida Exh. 7. For example, she has devoted time to the Jewish Community Centers of South Florida. *Id.* at 3.

103. Maria Elena Torano, a director and 1 percent shareholder of South Florida Broadcasting, proposes to work part-time, twenty hours per week, as public relations coordinator at the station. South Florida Exh. 8, Tr. 434-36. Ms. Torano is a Hispanic female who resides in Miami, Florida. South Florida Exh. 8. She has some broadcast experience; she produced and hosted weekly broadcast programs on WLTV-TV, Miami from 1976 to 1977, and on WQBA-AM from 1975 to 1977. *Id.* Ms. Torano participates in some civic activities in the Miami area but not in North Miami. South Florida Exh. 8. Among other groups, she has been active in the State of Florida Arts Council, the Dade County Hispanic Heritage Festival, the Dade County Commission on the Status of Women, Greater Miami Chamber of Commerce, and the International Center of Florida. *Id.* at 2-4.

104. *Radiocentro*'s issued and outstanding shares are owned by Villa Broadcasting Company. Radiocentro Exh. 1. Of the eight shareholders of Villa, six propose to be integrated into the operation of Radiocentro's proposed station. Radiocentro Exh. 3. Salvador Lew is president and director of both Villa and Radiocentro and is an 11.89 percent shareholder of Villa. Radiocentro Exh. 1. Mr. Lew proposes to work full time at Radiocentro's station as general manager. Radiocentro Exh. 3. Mr. Lew has radio broadcast experience; since 1974 he has been general manager and news editor of WRHC. Radiocentro Exh. 4. Mr. Lew resides in Miami and is Hispanic. *Id.* He has been involved in some civic activities in Miami. *Id.*, Tr. 305.

105. Felix A. Jiminez is treasurer and director of Radiocentro and a 21.16 percent shareholder of Villa. he proposes to work full time at the station as public service director. Radiocentro Exh. 1, 3, Tr. 312-13. Mr. Jiminez is Hispanic and resides in Miami, Florida. Radiocentro Exh. 5. Mr. Jiminez has broadcast experience as public relations manager at WRHC, Miami, but has no record of involvement in civic affairs. *Id.*

106. Reinaldo Gutierrez, who is secretary and director of Radiocentro and an 11.05 percent shareholder of Villa, proposes to work full time at the station as local sales manager. Radiocentro Exh. 1, 3, Tr. 316. Mr. Gutierrez is Hispanic, resides in Miami, and has participated in civic activities. Radiocentro Exh. 6.

107. Enrique Jiminez, who is secretary, director and a 12.00 percent shareholder of Villa, will work full time at the proposed station as the comptroller. Radiocentro Exhs. 1, 3; Tr. 323. Mr. Jiminez is Hispanic and a resident of Miami. Radiocentro Exh. 7. Mr. Jiminez has past broadcast experience as comptroller at WRHC. *Id.*, 323-24.

108. Alberto Villalobos, who is a 14.72 percent shareholder of Villa, will work full time at the proposed station as program director. Radiocentro Exhs. 1 and 3; Tr. 326. Mr. Villalobos is Hispanic and a resident of Miami, Florida. Radiocentro Exh. 8. Mr. Villalobos has some past radio broadcast experience. *Id.*, Tr. 327.

109. Celeste R. Vasquez de Lezcano, who is an 11.89 percent shareholder of Villa, will work full time at the proposed station as national sales manager. Radiocentro Exhs. 1 and 3, Tr. 330-31. Ms. Vasquez de Lezcano, however, indicated little familiarity with the duties of a national sales manager (Tr. 331) and indicated that she would have no supervisory duties but would be working under Mr. Lew. Tr. 336-37. Ms. Vasquez de Lezcano is a Hispanic female and resides in Miami, Florida. Radiocentro Exh. 9. She has no involvement in civic activities, only social and recreational organizations. *Id.*, Tr. 334-35.

110. *First Black Broadcasters*: Elaine W. Greene is First Black Broadcasters' president and director and is an 85 percent shareholder of its voting stock. First Black Exh. 1 at 1. Ms. Greene is First Black Broadcasters' proposed general manager. First Black Exh. 2 at 1. Her duties as general manager will include the hiring of employees, overseeing station operation and implementation of EEO policies. All station personnel will report to Ms. Greene, and she will be responsible for their actions. Ms. Greene does not want to perform any duties at the station for which she is unqualified. She will be responsible for anything that does not have to do with the program director of the station. Tr. 524-25. Ms. Greene is a black female residing in Lauderhill, Florida, which is part of Fort Lauderdale in Broward County. First Black Exh. 1 at 1. It is within the 1 mV/m contour of the proposed station. Joint Engineering Exh. at 7. Ms. Greene has spent two weeks each year on the membership drive of the Carver YWCA; she is a member of P.U.S.H. in the Miami area; and she has worked with charitable projects with her professional organization, Women in Management at Eastern Airlines. First Black Exh. 2 at 4.

111. Dallas L. Manuel, who is vice-president, secretary and 15 percent shareholder, will work full time at the proposed station as program director. First Black Exhs 1 and 3. Mr. Manuel is a black male and resides in Miami, Florida. First Black Exh. 1. Mr. Manuel has worked part-time (8 hours per week) at WFDR-FM, a Miami radio station, since 1972. First Black Exh. 3, Tr. 586. He has been active in the Mt. Sinai Baptist Church, the Southern Christian Leadership Conference's Miami Chapter, and Cub Scout Pack 411. First Black Exh. 3 at 3.

112. Non-voting stock represents 20 percent of the equity capital of First Black Broadcasters. All of First Black Broadcasters' non-voting stock is held by Rowan Skyers, a Jamaican citizen. First Black Broadcasters' Petition for Leave to Amend, filed November 25, 1983, granted,

Memorandum Opinion and Order, FCC 83M-4759, released December 20, 1983.

113. *Constance J. Wodlinger*: Constance J. Wodlinger, who is an individual applicant, proposes to work full time at the station as station manager. Wodlinger Exh. 1, Tr. 632. Ms. Wodlinger is female and currently resides in Mission Hills, Kansas and Naples, Florida. Wodlinger Exh. 1, Tr. 631. She plans to move to Miramar if her application is granted. Tr. 636. Ms. Wodlinger has broadcast experience; she is currently the station manger of KCLO-AM and KZZC-FM, Levenworth, Kansas. Wodlinger Exh. 1. Ms. Wodlinger has no record of civic activities in Miramar or the Miami area. Wodlinger Exh. 1, Tr. 644.

114. *Onyx Broadcasting of Miami, Inc.*: James E. Griffin, Jr. is president, director and 30 percent shareholder of Onyx. Mr. Griffin will work full time at Onyx's proposed station as general manager. In this capacity he will supervise the day-to-day operation of the station and will be responsible for hiring and firing of employees. He will be involved in planning and implementing programming. He is responsible for the total station operation. Onyx Exh. 1 at 1-2, Tr. 710-11.

115. From 1964 until 1972, Mr. Griffin worked at WMAL-AM and TV in Washington, D. C. His duties at that time involved the technical operations of the stations and included some supervisory duties. Tr. 712-13. In 1972, Mr. Griffin was promoted to assistant director of engineering at WMAL-TV, which is now WJLA-TV, Washington, D. C. Then, in 1975, Mr. Griffin became assistant news director of WMAL-TV. He left WMAL-TV in July 1979 to become director of broadcast operations for WPLG-TV in Miami. Tr. 713, 714. In January 1982, Mr. Griffin returned to WJLA-TV (formerly WMAL-TV) in Washington as director of broadcast operations. In January 1983, he was elected vice president of WJLA, Inc., and he holds that position today. Mr. Griffin's present employment at WJLA involves direct supervision of programming, production, engineering, design, community relations, personnel development and Congressional liaison. Onyx Exh. 1 at 5, 6; Tr. 714-15.

116. James Griffin will move to Miami if a license is awarded to Onyx. When Mr. Griffin previously resided in the Miami area, he was active as a member of the Board of Directors of the Black Archives, a south Florida organization dedicated to identification and preservation of materials pertaining to black history. Tr. 720-21.

117. Dwight A. Lauderdale is secretary, treasurer, director and 30 percent owner of Onyx. He is proposed as the director of news and public affairs for Onyx and, in this capacity, he will work full time. Onyx Exh. 2 at 1-2. Since May 1974 he has worked as a TV news reporter at stations WCKT-TV and WPLG-TV, which serve the Miami/Fort Lauderdale area. *Id.* at 2. Dwight Lauderdale has been a resident of Dade County since May

1974 and has a home within the primary service contour of Onyx's proposed station. *Id.*

118. Harold A. Martin is vice president, director and a 40 percent owner on Onyx. Upon grant of a license to Onyx, he will serve as the station's full-time general sales manager. In this position he will supervise account executives, sales assistants and traffic personnel. Onyx Exh. 3 at 1, Tr. 767-68.

119. Mr. Martin has eleven years' experience in selling broadcast advertising for radio stations in the Miami metropolitan area. He is a native of Miami and has lived in Dade County his entire life. He now lives in Miami. He is a member of the Mount Sinai Baptist Church in the Liberty City area of Miami. His civic activities in Miami have included participation in the fund raising committee of the Carver Branch of the Miami YMCA, in Operation Big Vote, which was an effort to have minorities vote, as well as participation in the CORBARS Boys Club. Onyx Exh. 3. All principals of Onyx Broadcasting of Miami, Inc. are black. Onyx Exhs. 1-3.

120. *Rana Broadcasting Company, Inc.*: Allen Wheeler, who is president, director and a 20 percent shareholder of Rana, will work full time at the proposed station as general manager. Rana Exhs. 1 and 3. Mr. Wheeler is a black male and currently resides in Park Forest, Illinois. Rana Exh. 3, Tr. 855. Mr. Wheeler plans to move to the Miami area if the application is granted, but not necessarily Liberty City. *Id.* Mr. Wheeler has broadcast experience. Rana Exh. 3. He has been employed at WMPP, Chicago Heights, Illinois since 1965 as the station's general manager. Rana Exh. 3 at 1-2.

121. Michael A. Benages, who is secretary/treasurer, director and currently 80 percent shareholder of Rana, will work full time at the proposed station as executive director. Rana Exhs. 1 and 4; Tr. 822. He will be responsible for all areas of station management and financial management. Although Mr. Benages currently owns 80 percent of Rana's stock, Garth Reeves will acquire 15 percent of Rana's stock from Mr. Benages. South Florida-Rana Stipulation. Mr. Benages is Hispanic and currently resides in Chicago, Illinois. Rana Exh. 4; Tr. 820. Mr. Benages has been involved in broadcasting since 1980 through ownership interests and part-time supervision of several radio stations. Rana Exh. 4; Tr. 821-26. Mr. Benages proposes to move to Dade County, Florida but not necessarily to Liberty City. Rana Exh. 4; Tr. 823.

122. *Southwest Radio Enterprises, Inc.*: None of the principals of Southwest proposes to be integrated full time or part-time into the management of the proposed radio station.

Auxiliary Power

123. Onyx, South Florida Broadcasting and First Black Broadcasters propose to equip thier stations with auxiliary power in order to operate in emergency situations. Onyx Exh. 1 at 10; South Florida Exh. 1 at 4; First Black Exh. 5 at 2.

Onyx's Failure to Document Its Financial Qualifications Pursuant to the Commission's Order

124. James Griffin, President of Onyx Broadcasting, said that his attorney, Mathew Leibowitz, told him at the end of June, 1983 that "Onyx was under no obligation to provide additional financial data to the Commission." Onyx Exh. 13 at 1. Messrs. Griffin and Leibowitz decided they would provide only what the Presiding Judge and the Commission "requested or required." *Id.* This became Onyx's "position" in discussions following the filing, on June 23, 1983, of petitions to enlarge by Constance Wodlinger against Onyx. *Id.* at 1-2. Mr. Griffin believes that the financial showing earlier submitted by Onyx demonstrated the underlying basis for its financial qualifications. *Id.* at 3. Mr. Griffin also stated that there was no basis for urging that Onyx believed that its arrangements with Southeast Bank and Miami Capital Development, Inc. were "less than firm" and that this motivated Onyx to withhold financial data. *Id.* at 4. He claims he did not know until September 8, 1983 that there might be a reason to conclude that Miami Capital could not lend Onyx money. *Id.* at 4. Mr. Griffin states that "Onyx's financial arrangements with Southeast Bank and MCDI played no role whatsoever in Onyx's response" to the Commission's June 2, 1983 *Order. Id.*

125. In its original application, Onyx relied on a letter dated June 18, 1981 from the Southeast First National Bank of Miami to the effect that the bank was willing to consider Onyx's request for a loan up to $500,000. Onyx Exh. 13 at 4, 34; Tr. 957-63. At that time, the bank advised Onyx that it could not make a decision on a loan commitment until a number of financial reports were submitted for review by the bank. South Florida Exh. 33; Tr. 935, 941-48. Onyx later submitted to the bank cash flow projections dated July 16, 1981, and personal financial statements for its principals dated July 31, 1981 through August 12, 1981. Tr. 950-51. Onyx did not at that time, or thereafter, report to the FCC that the bank's decision on its June 1981 loan request was contingent upon the bank's review of financial reports which had not yet been submitted to the bank, although it later acknowledged that the bank's June 18, 1981 letter was "not sufficient to file with [its] application." Tr. 963.

126. On September 17, 1981, the bank issued to Onyx its first firm commitment letter. Onyx Exh. 13 at 32. This commitment, "reflect[ed] a restructuring of Onyx's financial plan" (Tr. 970), but the loan amount of

$250,000 was not adequate to satisfy Onyx's proposed financial requirements of $418,447 in effect at that time. Onyx did not amend its application or otherwise report to the FCC, in the manner required by Section 1.65 of the Commission's Rules, the September 1981 commitment by the bank or its restructured financial plan.

127. In its February 1982 certification, Onyx recited the $250,000 bank commitment without reporting the date of the commitment or proposed terms. The bank's commitment was renewed on December 7, 1982 (after a three month lapse), and was in effect at the time of the Commission's June 2 *Order*. Onyx Exh. 13 at 30. The two Southeast Bank commitment letters were first filed with the Commission in August 1983.

128. In the July 1981 cash flow projections submitted to the bank in order to secure a loan commitment, Onyx represented that its principals would provide $50,000 in investors' contributions. Onyx Exh. 14 at 12, 14 and 16. The plan for investors' contributions was made by Onyx at the suggestion of Arthur Hill, vice president of the bank, in order to demonstrate Onyx's good faith to the bank in connection with the loan application. The proposed investors' contribution was adopted as part of Onyx's financial plan; and it continues to be Onyx's intent to provide such investors' contributions. Tr. 992-95, 1065-68. Onyx did not report its plan for investors' contributions in 1981, nor in its February 1982 certification, nor at any time following the Commission's June 2, 1983 *Order*, or in response to the August 4, 1983 *Order* issued in this proceeding.[17] According to the James Griffin, Onyx's agreement with the bank provided for a security interest in favor of the bank on real estate owned by Onyx's principals, assets to be acquired by the station, as well as stock of the corporation. South Florida Exh. 34; Tr. 999-1002. The bank's interest in real estate and assets were not expressed in its commitment letters of September 1981 and December 1982, nor were these interests reported by Onyx following the Commission's June 2, 1983 *Order* or in response to the August 4, 1983 *Order*.

129. During the summer of 1981, Onyx also applied for a loan from Miami Capital Development, Inc. as part of its efforts to seek an aggregate of $500,000 from lending institutions. Onyx Exh. 14 at 15. South Florida Exh. 20. Onyx submitted to MCDI essentially the same financial information it submitted to the bank, including cash flow projections and personal financial statements. Onyx Exh. 14; Tr. 994. In a

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[17] Balance sheets filed for Onyx's principals in financial amendments dated August 18, 1983, and financial statements filed with its August 15, 1983 Motion for Summary Decision make no reference to the proposed investors' contributions. The balance sheets showed that two of Onyx's principals had $39,620 in net liquid assets—an amount adequate to meet a newly proposed $34,000 loan to Onyx, but apparently inadequate to satisfy, in addition, the proposed investors' contributions plan in effect at the time, of which a total of $84,000 had been committed by the principals.

summary of the loan request to MCDI, it was stated that aggregate loans required from the bank and MCDI would be $400,000 rather then $500,000, and that Onyx principals would invest $150,000 rather than $50,000 in the venture. Onyx Exh. 14 at 3.[18]

130. On September 16, 1981, MCDI approved a $150,000 loan commitment to Onyx. South Florida Exh. 23 at 1. This commitment was a participation loan with the Southeast Bank, and subject to a number of conditions governing federal grant loan funds administered by MCDI and earmarked for the Onyx loan since 1981. South Florida Exhs. 17, 18, 23, 30, and 34; Tr. 1092-93, 1119, 1147-48, 1154-55. On October 9, 1981, MCDI issued a loan commitment letter to Onyx (South Florida Exh. 24) which included standard terms and conditions contained in all MCDI commitments. South Florida Exhs. 18 and 24; Tr. 1106-08, 1154-59.[19]

131. Onyx expressed dissatisfaction with the detail of conditions contained in MCDI's October 1981 commitment letter; and it requested MCDI to issue an "abbreviated," less specific, commitment letter, following the format of the Southeast Bank letter, containing "elements necessary to satisfy the requirements of the Federal Communications Commission for purposes [of] the application." Onyx Exh. 15; South Florida Exh. 23 at 2 and Exh. 34; Tr., 997, 1005. In making this request, Onyx acknowledged an "understanding that specific terms and conditions would be met prior to actual distribution of funds." South Florida Exh. 34 at 2. MCDI's accommodation of Onyx's request was a departure from its normal procedures in order to strengthen Onyx's presentation of financial qualification before the FCC. Tr. 1158-539; South Florida Exh. 23 at 2. *See also* South Florida Exhs. 28 and 30.

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[18] About 99 percent of MCDI's loans involve proposals which include investor capital contributions, and it is undisputed that MCDI relied on at least $50,000 in such contributions by the Onyx principals in making its loan commitments to Onyx. Tr. 1121-22. Mr. Griffin denied that the Onyx principals told MCDI that they would increase their investors' contributions from $50,000 to $150,000. Tr. 993-94. The financial analyst who identified MCDI's records, but was not involved with the Onyx transaction in 1981, suggested that increased investor contributions possibly may have been a recommendation by the financial analyst who presented the loan summary rather than a new commitment by Onyx principals. Tr. 1117-21.

[19] Information on basic conditions governing eligibility for the Federal grant funds which applied to the Onyx loan were outlined in a handout (South Florida Exh. 17) which MCDI routinely provided to loan applicants at the time of Onyx's loan application. Tr. 1100-01. Mr. Griffin does not recall that he or the other Onyx principals received this handout. Tr. 988-89. However, he was clearly aware of the Federal Government origin of MCDI's loan funds (South Florida Exh. 34 at 2; Tr. 1004); he was advised of standard conditions governing such loans by the October 9, 1981 commitment letter (South Florida Exh. 24); and Onyx received a description of a specified part of the Miami area where, as acknowledged by Mr. Griffin, Onyx would have to locate its station as a precondition to receipt of funds from MCDI. Tr. 998, 1028-29.

132. After receiving one more letter which was not acceptable in form to Onyx (South Florida Exh. 25; Tr. 1007-08), Onyx accepted a letter dated December 7, 1981, providing a commitment of $150,000 through January 31, 1982. South Florida Exh. 26. This letter, and subsequent renewals, was an informal commitment issued with the understanding that several conditions deleted from the original October 8, 1981 commitment would be included in a formal commitment to be issued after the grant of Onyx's FCC application. Among the conditions which were described by the MCDI as non-negotiable, but were excluded form the abbreviated letter requested by Onyx, are the following:

(1) Onyx would locate its studio within a specified part of the Miami area (Tr. 988, 1028-29, 1105-07, 1155, South Florida Exh. 18);

(2) Onyx would acquire business hazard and liability insurance (Tr. 1105-07, 1155; South Florida Exhs. 18 and 24);

(3) Onyx would provide to MCDI personal and corporate tax returns during the term of the loan (Tr. 1105-07, 1156; South Florida Exhs. 18 and 24);

(4) Onyx would provide to MCDI periodic corporate financial statements (*Id.*);

(5) Onyx would provide to MCDI periodic personal financial statements for its principals (*Id.*);

(6) The commitment would be void if Onyx did not secure a private sector bank commitment matching or exceeding MCDI's commitment (Tr. 1105-07, 1156-57; South Florida Exhs. 17, 18 and 24); and

(7) Onyx's total indebtedness could not exceed a certain factor of its tangible net worth without the express consent of MCDI during the life of the loan (Tr. 1105-07, 1157; South Florida Exhs. 18 and 24).[20]

133. Onyx did not report the December 7, 1981 MCDI commitment letter to, or file it with, the FCC within 30 days as provided by Rule 1.65. Rather, upon the recommendation of its counsel, because the commitment was of short duration, Onyx decided not to amend its application to report the MCDI commitment until after it had been renewed for a longer period of time. South Florida Exh. 26.

134. On February 5, 1982, the MCDI loan commitment to Onyx was renewed through August 31, 1982, corresponding with the duration of the Southeast Bank commitment. Onyx Exh. 13 at 23, 32. In its certification and amendment, filed on February 24, Onyx recited the $150,000 MCDI commitment without reporting the commitment date or proposed terms. The letter was renewed on December 28, 1982 (following a four month lapse), effective through September 30, 1983, again corresponding with the duration of the bank commitment. Onyx Exh. 13 at 21, 30; South

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[20] Although Mr. Griffin expressed Onyx's philosophical disagreement concerning some, but not all, of these non-negotiable terms (South Florida Exh. 34; Tr. 1002-04), there is no indication that Onyx accepted the abbreviated commitment letters without intending to consumate the transaction under the terms and conditions required by MCDI.

Florida Exhs. 23 and 30; Tr. 1018-19, 1136. This commitment was in effect at the time of the Commission's June 2 *Order*.

135. In its August 1982 request to MCDI for a renewal of the commitment, Onyx, through its counsel, wrote:

> It is necessary to file a renewal letter with the FCC to demonstrate our continued financial qualifications. Accordingly I would request that the bank issue a renewal letter and forward it to me as soon as possible so that I can file it with the FCC.

South Florida Exh. 29 at 2. Onyx did not file the commitment renewal letter with the FCC at that time, nor within 30 days of the Commission's June 2, 1983 *Order*.

136. Onyx claimed that its failure to document its financial qualifications after the Commission's June 2, 1983 *Order* was justified on the basis of its counsel's opinion, expressed in discussions during June-July 1983.[21] and in pleadings filed on July 8 and 20, 1983. Onyx Exh. 13 at 1-3; Tr. 1046-47. Concurrently, however, on July 12, 1983—more than three weeks before this argument was rejected — counsel for Onyx advised MCDI it had been requested to file loan commitment letters with the FCC and asked that MCDI quickly issued a revised commitment letter for submission in response to the Commission's June 2, 1983 *Order*. South Florida Exh. 31; Tr. 1026-27.

137. Mr. Griffin testified that Onyx's financial arrangements with MCDI and the Southeast Bank did not influence its response to the Commission's June 2, 1983 *Order*, and that following the August 4, 1983 *Order* it submitted all financial documentation. Onyx Exh. 13 at 3-4.

Conclusions

The Proposals Considered Pursuant to § 307(B) of the Communications Act

138. The parties in this proceeding are applicants for deleted FM channel 243C at Miami, North Miami, North Miami Beach, Miramar or Liberty City, Florida.[22] Of these communities, only Miami has existing broadcast transmission service; it has 17 radio stations and 10 television stations assigned to it. All propose the same power, each will place a city grade signal over each others proposed community. South Florida Broadcasting (North Miami), First Black Broadcasters (Miami), Constance J. Wodlinger (Miramar), Onyx (Miami), and Rana (Liberty City) propose

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[21] Mr. Griffin does not recall that his discussions with counsel following the June 2, 1983 *Order* focused on the portion of the *Order* requiring financial documentation. Tr. 1040, 1043.

[22] Channel 243C was assigned to Miami in August of 1980 when it was substituted for 242C. *Amendment of Section 73.202(b)*, 47 Rad. Reg. 2d (P&F) 1280 (1980). At that time Channel 242 was occupied by WMJX, which was licensed to WMJX, Inc. WMJX was given one year to change channels; on January 31, 1981, renewal of the license it held was denied. *WMJX, Inc.*, 85 F.C.C. 2d 251 (1981).

identical coverage from an antenna location known as the Candleabra site. Radiocentro (Miami) and Southwest (North Miami) propose different sites but even their sites are in close proximity to the other applicants. While overall the applicants at the Candleabra site would bring service to 279,000 more people than Southwest and 15,233 more than Radiocentro, those people already have available five or more daytime reception services. Seventeen people will receive a second nighttime service from the Candleabra applicants, 31 a third nighttime service and 6 a fourth nighttime service. To put this additional coverage in perspective, all applicants will place a primary signal over metropolitan Dad County with a population of 1.7 million.

139. With the exception of Miramar, which is in Broward County near the northern boundary of Dade County, all the communities applied for are in Dade County. Dade and Broward Counties and the municipalities within them have, for over thirty years, formed a contiguous metropolitan area. The communities in the counties are interdependent in terms of economy, employment, environment, population trends, housing, tourism, recreation, cultural resources, water resources, waste disposal and transportation needs. Residents live in one place within the area, work, shop or play in another. For example, of the workers 16 or older who live in North Miami, 66 percent work outside the community, in North Miami Beach, 76 percent work outside the community, and in Miramar, 79 percent do. M. Barry Peterson, Executive Director of the South Florida Regional Planning Council, characterized these communities as residential or bedroom communities. Mr. Peterson noted that residents in the Dade/Broward metropolitan area shop in regional centers, share common transportation and communication facilities, and participate in regional cultural and recreational activities.

140. The record reflects that a resident's identification with the municipality in which he or she lives is not altogether absent but that rapid growth which has brought new settlers and high mobility has lessened the differentiation between suburbs. This extends to government. The Dade County Commission has legislative authority over Dade County municipalities. It can, for example, determine whether any municipality can exist within the county. The county provides education and health services, operates the airport and seaport, maintains the arterial roads, operates bus and rapid transit systems, provides fire protection to all areas but Miami, Miami Beach, Coral Gables, and Hialeah, and provides water and sewer services to most areas. In addition, many police functions, social services, and emergency management are provided county-wide.

141. Arlene Lotz, an expert on the area, testified that private community institutions exist on a county basis and that all major shopping

malls built within the last twenty years are located in unincorporated areas and attract shoppers from all surrounding areas. Ms. Lotz's testimony is perhaps no better illustrated than by the past behavior of the stockholders of South Florida Broadcasting. Their application is for North Miami (although originally they applied for Miami), but they live throughout the area and participate in a variety of area organizations. Elaine Bloom, who is an officer and integrated principal, lives in North Miami Beach but she has worked at radio stations in Miami and Miami Beach where she specialized in public affairs programming. her civic participation has been entirely in functions that serve the entire area, not just North Miami, or even the community where she lives, North Miami Beach. She has participated in the Greater Miami Chamber of Commerce, the Florida Philharmonic Board of Directors, Dade County Local Government Study Commission, and many other organizations that are interested in the affairs of the region.

142. All the rest of the South Florida stockholders and principals, George Feldenkreis, who lives in North Miami, and Frank Soler, Francena Thomas, Muriel Russell, and Maria Elena Torano, who live in Miami, exhibit the same regional interests. Similar observations could be made about the principals of other applicants who live in metropolitan Miami.

143. There are, of course, as Ms. Lotz testified, functions that municipalities which are under consideration here perform for their residents. They have local governments, collect garbage, undertake zoning, provide limited police protection, and enforce building regulations. However, Ms. Lotz pointed out that these functions are limited. The evidence introduced by the applicants lends support to her conclusion.

144. Miami, which has existing broadcast facilities, is a complex city and its social, cultural, economic, and governmental importance to the area is unmatched by any other surrounding community. The population of Miami is over 400,000. In contrast, North Miami Beach's population is 36,553, North Miami's is 42,566, and Miramar's is 32,813. Channel 243C was allocated to Miami in order that it might serve that sizeable community and the surrounding area. 47 C.F.R. § 73.206(b)(2) (1983). The deleted facility, of course, was a Miami transmission facility and its signal extended to the metropolitan area.

145. "[I]n deciding whether a proposal is for a suburban or principal city, the problem is not only whether a community with which a proposal is identified is commercially, geographically, and culturally independent from another city, but also whether in view of the proposals involved — with particular concern for their frequency, power and coverage — the needs of the community proposed to be served are to be considered apart from those of its nearby principal city or the urbanized area as a whole." *Massillon Broadcasting Co.*, 36 F.C.C. 809, 812 (1964) (footnotes omit-

ted). The facts presented show that the communities in the Miami area are highly dependent on each other. They are economically, geographically, and culturally integrated. To favor one Miami proposal over another, because the applicant selected a Miami suburb that has no transmission facility, would be to use an artificial measure. No applicant has shown that the community it has selected is so independent and isolated from the metropolitan area that it warrants a preference on that ground alone. *See Seven Locks Broadcasting Co.*, 37 F.C.C. 82, 84-85 (1964).[23] the applicants have recognized that the frequency, power and coverage of Channel 243C is designed to serve the entire area; and they all propose to serve the whole Dade/Broward metropolitan area. Under the circumstances presented, there is no valid § 307(b) policy reason for distinguishing between applicants on the basis of the communities they designated.[24]

Rana Broadcasting's Compliance with 47 C.F.R. § 73.1120

146. While it has been apparent from the onset of the proceeding that Miami, North Miami, North Miami Beach and Miramar are communities within the meaning of § 307(b), it has not been evident that Liberty City is one. This arises because the area described as Liberty City is mainly within the city limits of Miami, although the area has certain characteristics which set it apart from the rest of the city. The area's population is, to a great degree, black. In addition, Liberty City residents have common social, cultural and educational interests and they share common problems, such as unemployment, poverty, sub-standard housing and crime. This has led to the establishment of a number of problem-solving programs in the area and the formation of Liberty City organizations. The area, because of its large black population, is also the center for many black civic organizations in Miami.

147. While Liberty City is not a separate governmental unit, in some instances that has not been a prerequisite to recognizing a community for allocation of transmission facilities pursuant to § 307(B). *Seven Locks Broadcasting Co.*, 37 F.C.C. 82, 83-84 n. 1 (1964). In *Seven Locks* the Commission found that the Washington suburban areas of Potomac-Cabin John, Maryland and McLean, Virginia were communities for § 307(b) purposes, although neither one was a governmental unit. Rana Broadcast-

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[23] In addition, the Commission has long noted that, in proceedings like this, "even though each proposal may emphasize and direct its live programs to meet the needs of the suburban community . . . it is axiomatic that in other respects, general diversified types of programs (such as entertainment, educational information, etc.) will serve the needs of the entire regional area . .." *Massillon Broadcasting Co.*, 36 F.C.C. 809, 812-13 (1964).

[24] While this conclusion permits Miami applicants to be considered on the same basis as suburban applicants, it should be noted that Miami's large number of transmission facilities are, almost without exception, regional facilities that serve the surrounding area.

ing, the applicant for Liberty City, asserts that *Seven Locks* is analogous to its own claim. There are similarities: Liberty City, like Potomac-Cabin John and McLean, is primarily a residential area. But, unlike those communities, Liberty City's geographic boundary is made up of areas and populations "more logically identified as, or associated with, some other location." *Seven Locks Broadcasting Co.*, 37 F.C.C. at 84. Most of Liberty City is part of Miami, its residents participate in Miami's government and look to Miami for services, and the area has long been identified as part of Miami. Large complex American cities commonly have areas, or neighborhoods, that have separate, and often unique, identities. Liberty City's claim to § 307(b) status is merely a demonstration of the typical diversity of a large city. It is not, however, a showing that comes within the Commission's § 307(b) licensing scheme. Rana Broadcasting has not shown that its application meets the requirements of § 73.1120 and, therefore, its proposal does not qualify for comparative consideration.

The Availability of Radiocentro Broadcasting and Southwest Radio Enterprises' Transmitter Site

148. While both Radiocentro Broadcasting and Southwest Radio Enterprises initially designated the same tower, their actions, when they became aware that the tower was no longer available, differ and this difference dictates concluding that Radiocentro is technically unqualified because it does not have an antenna site and that Southwest Radio is qualified because it secured a new site. At the time of designation of their applications for hearing, it was apparent that the position on the WBPT-TV tower occupied by the former licensee of Channel 243C, WMJX, Inc., was no longer available. WMJX had, through a diplex arrangement, shared a location on WBPT-TV's tower with WAIA-FM. However, after WMJX stopped broadcasting, WAIA removed the diplex equipment, and it is no longer willing to share its antenna.

149. Radiocentro has known that this would be the case since at least November 17, 1981 but it has taken no step to find another site. It relies on the Commission's holding in comparative renewal hearings that it can be presumed that if a challenger wins, the renewal applicant will sell its site to the prevailing applicant. In contrast with that principle, however, Radiocentro concedes that the former WMJX site is unavailable. Moreover, Radiocentro, in making its legal argument, fails to address that decisionally important difference. For example, in *George E. Cameron, Jr. Communications*, 71 F.C.C. 2d 460 (1979) and *Belo Broadcasting Corp.*, 88 F.C.C. 2d 922 (1981) (cases on which Radiocentro relies) the presumption of site availability arose because the sites were being used by the licensees who were being challenged. When there are no facts that give rise to the presumption — that a current licensee will normally sell its site to a new licensee — the general rule applies, namely, that when a

designated site becomes unavailable, an applicant that fails to designate a new site is technically unqualified. *See Shoblom Broadcasting, Inc.*, FCC 83R-65, released September 7, 1983, *affirmed by Order*, FCC 84-119, released April 2, 1984.[25] Radiocentro admits it has no antenna and it is, therefore, technically unqualified.

150. Southwest Radio Enterprises did not intend to diplex with WAIA-FM on the WBPT-TV tower. Instead it proposed to locate on a different part of the WBPT-TV tower. However, that position too became unavailable when WBPT-TV located another antenna in the position Southwest Radio proposed. WBPT-TV did not notify Southwest Radio Enterprises because it was not aware that Southwest Radio Enterprises had designated the WBPT-TV tower. It is now apparent that Southwest Radio believed it had a promise from WBPT for the use of its tower, when it did not. Southwest Radio relied on its experienced consulting engineer to establish the availability of the tower location it needed. And that engineer believed that he had arranged for the WBPT-TV site. Nevertheless, to insure that the understanding of its engineer was accurate, counsel for the applicant wrote to the manager of WBPT-TV to confirm that the tower was available. The letter was apparently misplaced after it was sent and the fact that the tower was unavailable was not made known to Southwest Radio. These facts do not support a finding that Southwest Radio misrepresented the tower's availability, or that it did not act reasonably in designating WBPT's tower. Southwest Radio's failure to have a site was due to the accidental loss of its letter to WBPT-TV.

151. Moreover, Southwest Radio, before the hearing began on May 23, 1983, proposed a new site in an amendement filed May 3, 1983. There is no question that the amended site is available. Southwest Radio has also submitted an engineering exhibit, Southwest Exh. 6, to reflect its coverage at the new site. Good cause exists for accepting both the amendment and Exhibit 6. Southwest Radio Enterprises is technically qualified.

First Black Broadcasters' Efforts to Interfere With the Prosecution of Competing Applications Through Petitions to Enlarge About Site Availability

152. Initially, six applicants, First Black Broadcasters, South Florida Broadcasting Company, Rana Broadcasting Company, Onyx Broadcasting of Miami, Inc., Constance J. Wodlinger, and William H. Hernstadt, proposed to locate their antennas at a site owned by Candleabra, Inc. First

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[25] Radiocentro points out that the Commission has applied the presumption in a case where one of the applicants obtained the right to the former site and the Commission presumed it would sell that right if a grant were made to another applicant. But that is not the case here, since no party has a right to WMJX's diplex arrangement with WAIA.

Black Broadcasters claimed, in petitions to enlarge, that the site was available to only First Black Broadcasters and was not available to the other applicants that had designated the site. Not only was First Black Broadcasters' claim that the site was not available inaccurate, but First Black Broadcasters knew, or should have known, that the site could be used by the other applicants when it represented to the Commission that it was not available.

153. The manager and part owner of the Candleabra, Inc. site, Ronald Crider, offered an option for Candleabra's tower to any applicant that requested one. Although First Black Broadcasters agreed in April, 1981 to pay for the option, which required monthly payments to Candleabra of $1,000, Candleabra continued after that to offer options to other applicants in this proceeding.

154. Nevertheless, in mid-October, Robert Speiser and Candleabra's Ronald Crider called First Black Broadcasters' Washington counsel, Mary Albert, and told her that First Black Broadcasters was the only applicant to have an agreement to use the Candleabra tower. During that conversation, Mr. Crider, or Mr. Speiser, suggested that Mr. Crider claim in an affidavit to the Commission that the tower was not available to the other applicants that had not reached an agreement with Candleabra on the option.

155. Ms. Albert pointed out that the Commission would probably assume the tower would be available to the others if First Black Broadcasters did not prevail. However, Mr. Crider represented that there were contingent leases with non-applicants for First Black Broadcasters' optioned tower position. Ms. Albert wrote to First Black Broadcasters' president, Elaine Greene (a copy was also sent to First Black Broadcasters' other stockholder, Dallas Manuel) about her conversation with Messrs. Speiser and Crider. She also sent Ms. Greene a copy of the affidavit she prepared for Mr. Crider.

156. When Mr. Crider did not sign the affidavit, First Black Broadcasters encouraged him to sign and quickly paid Candleabra the past due option money in an apparent effort to get him to sign the affidavit. After receiving the option money, Mr. Crider signed the affidavit and notified the applicants that had not yet signed option agreements that the site was not available; then, on January 7, 1983, First Black Broadcasters filed petitions to enlarge alleging that the Candleabra site was not available.

157. First Black Broadcasters, aside from urging Mr. Crider to sign an affidavit it prepared, took no steps to verify its allegations. It never asked Mr. Crider who the contingent lessees were and, of course, it did not ask to see the leases. Moreover, when Mr. Crider removed Mr. Hernstadt's name from the list of applicants who did not have an agreement with Candleabra, First Black Broadcasters made no inquiry. If it had, it would

have discovered that Mr. Hernstadt had also been given an option for the Candleabra site after Mr. Crider represented that the site was unavailable to him. Furthermore, there is no indication that First Black Broadcasters ever asked Mr. Crider whether the other applicants were continuing to talk to him about option agreements. If it had done so, of course, it would have discovered that Mr. Crider and the other applicants were continuing to discuss options for the Candleabra site.

158. While First Black Broadcasters' failure to investigate Mr. Crider's representations demonstrates at least carelessness, its failure to reveal that it had the right to sell its option to the winner in this proceeding makes its claim one of deceit. (The testimony confirms that every First Black principal and agent, Dallas Manuel, Elaine Greene, George Greene, and Robert Speiser and Candleabra owner, Ronald Crider knew this to be a fact.) Furthermore, because First Black Broadcasters holds the right to transfer its option, it had to know that Mr. Crider's representations about contingent option holders for First Black Broadcasters' antenna site were irrelevant to the question of availability of the site to other applicants in this proceeding. In any event, even if that were not the case, the most cursory inquiry would have resulted in First Black Broadcasters finding out that the alternative option holders referred to by Mr. Crider had already been given other space on Candleabra's tower.

159. Finally, from the very start of the petition to enlarge scheme, Elaine Greene and Dallas Manuel, First Black Broadcasters' only principals, were informed by their attorney about what was being done. In addition, their chief advisor, Robert Speiser, participated at all times. Neither Ms. Greene and Mr. Manuel, nor any of the persons associated with them, took any steps to stop what they knew, or should have known, was a dishonest action. The Commission must rely on an applicant's representations in pleadings. *See RKO General, Inc. (WNAC-TV)*, 78 F.C.C. 2d 1, 97-98, 103 (1980). In this case, First Black Broadcasters knowingly made inaccurate claims. Its reason for its actions was, of course, to raise doubts about the qualifications of the other applicants in an effort to forward its own application. A substantial comparative demerit will result.[26]

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[26] The site availability issues also raise questions about First Black Broadcasters' qualifications to become a licensee. Dallas Manuel is, after all, an experienced broadcaster and should, therefore, be acutely aware of the importance of being honest in his filings with the Commission. However, the wrongdoing does not appear to have been initiated by him or Ms. Greene, but instead by their agents, Mr. Speiser and Ms. Albert. In this case that saves First Black Broadcasters from being disqualified, but not from the ultimate responsibility which will weigh heavily on its comparative standing.

Comparative Factors

1. Diversification of Ownership and Control of the Media

160. Neither Onyx, First Black Broadcasters, Southwest, nor their stockholders, have media interests.

161. While South Florida Broadcasting owns no media, some of its stockholders, Francisco Soler, Maria Elena Torano and Judith Hernstadt, do. Mr. Soler, who is an officer, director, proposed part-time programming director and owner of nine percent of South Florida Broadcasting's stock, owns, controls and directs the Quintus Communications Group which publishes the monthly Hispanic magazine, *Miami Mensual*. Mr. Soler writes editorials for *Miami Mensual*. Eighty percent of the magazine's 70,000 circulation is in the Miami area. This relationship requires a slight demerit because of its impact on local diversity. Judith Hernstadt, who owns a twenty percent beneficial interest in South Florida Broadcasting, but is not integrated into the management of the proposed station, is an officer and twenty percent owner of WKAT-AM, Miami Beach, Florida; her husband, William H. Hernstadt, owns the remaining eighty percent. Ms. Hernstadt has said that she will divest her twenty percent interest in WKAT to her husband. But, of course, her husband's interest will continue and his interest in WKAT is attributable to her.

162. Ms. Hernstadt, because of her attributable interest in WKAT, has a voting trust agreement with South Florida Broadcasting's principal, Elaine Bloom. Elaine Bloom will vote Ms. Hernstadt's shares until WKAT is sold. While the trust could end if the trustee resigns, and Ms. Hernstadt could then vote her shares, that eventuality is controlled by the trustee, not by Ms. Hernstadt. The impact on diversity of Ms. Hernstadt's interest is slight since she is unable to exercise any control over South Florida Broadcasting's facility and she exercises no direct control over WKAT. Ms. Torano's 5.56 percent interest in Los Cerezos Television, which holds a license for an operating television translator in Washington, D. C. and a permit for one in Cleveland, is too small and too distant from Miami to warrant comparative consideration. Moreover, translators do not originate programming and their impact on diversity is slight. *See Greater Wichita Telecasting, Inc.*, 55 Rad. Reg. 2d (P&F) 926, 929-30 (1984). Ms. Hernstadt and Mr. Soler's interests result in South Florida receiving a slight demerit on diversification.

163. Constance J. Wodlinger is an individual applicant and would work full time at the station. Along with her husband, she owns Wodlinger Broadcasting, the licensee of KCLO-AM and KZZC-FM, Leavenworth, Kansas. Her controlling and operating interest in these facilities in another market requires a moderate demerit because of her control and operation of the proposed Miramar facility.

2. Integration of Ownership and Management

164. Southwest Radio proposes no integration. Onyx, First Black Broadcasters and Constance J. Wodlinger propose to integrate all of their owners into management. And South Florida Broadcasting proposes full-time integration by one fifteen percent stockholder, Elaine Bloom, who votes 31 percent of the shares, and part-time integration by five stockholders, George Feldenkreis, Frank Soler, Muriel Russell, Francena Thomas, and Maria Elena Torano, who own 65 percent of the stock and vote 69 percent of the stock.

165. The two owners of First Black Broadcasters, Elaine Greene and Dallas Manuel, will work full time as general manager and program director respectively. Ms. Greene lives within the primary service area of the proposed facility and Mr. Manuel lives in Miami. both of them have participated, on a limited basis, in area civic activities. Mr. Manuel has part-time radio broadcast experience. Ms. Greene, who owns 85 percent of the applicant, is black and a woman and Mr. Manuel, who owns the remaining 15 percent, is black.

166. Onyx has three full-time integrated owners: James E. Griffin, Jr., who is president and 30 percent owner, will be the full-time general manager. Dwight A. Lauderdale, who is secretary, treasurer, director and 30 percent owner, will work full time as director of news and public affairs. And Harold A. Martin, who is vice president, director and 40 percent owner, will be general sales manager. Messrs. Lauderdale and Martin live in Dade County and have for more than ten years. Mr. Martin lives in Washington, D. C. but he lived in Miami from 1979 to 1982, when Onyx's application was filed, and would return to Miami if a grant is made. Messrs. Martin and Griffin have participated in a few area civic activities. All three of Onyx's stockholders have broadcast experience; each also has current experience as a broadcaster in the Miami market, and Mr. Griffin has broadcast management experience. The three men are black.

167. Constance J. Wodlinger is an individual applicant. She does not live in Miramar, but she would move there. She has broadcast management experience and she would work full time at the station as general manager. She also receives credit for being a woman.

168. Elaine Bloom, who votes 31 percent of South Florida Broadcasting's shares, is an officer, director and proposed full-time station manager. She lives within the primary service area and has been very active in the area's civic organizations. She has recently worked at a radio station in a management position.

169. George Feldenkreis, who owns and votes 43 percent of South Florida Broadcasting's shares, is president, a director and would work 20 hours per week as financial director. He lives in North Miami and has

participated in area civic activities. He has no recent broadcast experience. Frank Soler, who owns 9 percent, is an officer and director; he would work 20 hours a week as news and music programming director. Mr. Soler lives in Miami, where he is active in civic activities. He is Hispanic and, although he has no experience working at a broadcast station, he has been a director of a local non-commercial television station. Francena Thomas, who votes 7 percent of the shares, is also an officer and director of South Florida Broadcasting. She would work 20 hours per week as minority programming coordinator. Ms. Thomas lives in Miami and has been active in area civic affairs. She has worked part-time in broadcasting. Ms. Thomas is a woman and black.

170. Muriel Russell, who votes 9 percent of the shares, and Maria Elena Torano, who votes and owns 1 percent of the shares, are directors and would work 20 hours per week as marketing director and public relations coordinator respectively. They live in Miami and have participated in civic activities. Ms. Torano has worked on some broadcast programs. both are women and Ms. Torano is Hispanic.

171. Onyx and First Black Broadcasters are to be preferred for their integration proposals over the other applicants. Although their integration proposals are different, on balance they are equally strong. Onyx is superior to First Black Broadcasters in the area of broadcast experience. All the principals of Onyx have broadcast experience, while First Black Broadcasters has only one principal, Dallas Manuel, who owns 15 percent of the applicant, with part-time radio experience. This strength of Onyx's is balanced by the presence of a woman owner who controls First Black Broadcasters, while Onyx has none. In all other quantitative and qualitative respects, First Black Broadcasters and Onyx are equal and present those characteristics the Commission favors. All owners of both applicants will work at the station in management, they live in the area, or did at the time the application was filed and would do so again if a grant is made. Members of each applicant have participated in civic activities in the service area, and both applicants are controlled by blacks.

172. Constance J. Wodlinger is nearly equal to Onyx and First Black Broadcasters. However, she does not live in Miramar and has not participated in its civic activities. Therefore, on the basis of qualitative considerations, her proposal is comparatively less favorable than Onyx and First Black Broadcasters.

173. South Florida Broadcasting proposes less quantitative integration than Onyx, First Black Broadcasters, and Constance J. Wodlinger. It proposes only 31 percent full-time integration against Onyx, First Black Broadcasters, and Constance J. Wodlinger's 100 percent proposals. However, additional weight is accorded South Florida Broadcasting's proposal because it will integrate into management, on a part-time basis,

the remaining 69 percent of the controlling stockholders. The part-time manager-owners have qualitative attributes which include local residence, civic participation, broadcast experience and minority preferences. While South Florida Broadcasting's part-time integration is not entitled to as much weight as the other applicants' greater full-time promises, it greatly narrows the comparative differences between its proposal and that of Constance J. Wodlinger, who is not a local resident.

3. Auxiliary Power and Comparative Coverage

174. Onyx, South Florida Broadcasting and First Black Broadcasters propose auxiliary power and for doing so they are entitled to a slight comparative preference. Onyx, South Florida Broadcasting, First Black Broadcasters, and Constance J. Wodlinger all propose the same coverage. There is, therefore, no comparative difference in their coverage. While these applicants will cover more people and area then Southwest Radio, the only qualified applicant who will not broadcast from the Candleabra site, the service they will provide to underserved listeners or areas is insignificant.

4. Onyx's Failure to Provide Timely Documentation of its Financial Qualifications in Response to the Commission's Order

175. Because Onyx certified its financial qualifications, it should have, pursuant to the Commission's ruling (*South Florida Broadcasting Co., Inc.*, 94 F.C.C. 2d 452, 455 (1983) hereafter "June 2, 1983 *Order.*"), submitted within 30 days, by July 2, 1983, the documentation to support its certification. It did not do so; instead, Onyx asserted that it believed that it was not the Commission's intent that it needed to substantiate its financial proposal beyond that which it had already provided. Onyx decided it could rely on its certification until directed by the presiding officer to provide support. The Commission's June 2, 1983 *Order* was, however, in no sense ambiguous and Onyx's reason for not doing what the Commission directed appears to be a pretext.

176. After its reading of the Commission's *Order* was rejected, Onyx submitted, on August 26, 1983, the underlying support for its financial proposal and requested summary decision. However, before that request was considered and, presumably, because the request had generated substantial objections, on October 7, 1983, Onyx filed a second request for summary decision with a new financial showing. That showing established that Onyx was financially qualified.

177. South Florida Broadcasting maintains that the real reason that Onyx did not comply with the Commission's June 2, 1983 *Order* is that Onyx did not have a satisfactory financial plan to justify its certification. There appears to be substantial merit to South Florida's argument. On

August 4, 1983, Onyx was informed that its reading of the Commission's June 2, 1983 directive was incorrect. It was not until three weeks later that a financial showing was supplied by Onyx and it was not until nine weeks later, on October 7, 1983, that a legally acceptable showing was filed. By then, the required financial documents were three months past due. At the very least, Onyx's delay raises a strong inference that it deliberately avoided making the financial showing that the Commission required on July 2, 1983 because it did not have adequate support for its certification and that the reasons it asserted for not making a timely filing were untruthful.

178. The testimony of Onyx's principal and president, James Griffin, does not rebut the inference. First, he claims that the financial documents on file with the Commission at the time Onyx certified also demonstrate that it was financially qualified. Not only did he not substantiate that claim, but Onyx's submission of a certification demonstrates that it was not, since Onyx would not have needed to certify if its showing on file was adequate. Second, Onyx also maintains that the August 26, 1983 showing it made was adequate. However, that claim is far from evident since South Florida persuasively argued that it was not, and, when it did, Onyx filed, on October 7, 1983, a new financial proposal. And, third, Mr. Griffin testified that one of the reasons why Onyx decided to wait until the presiding officer requested the documents was to avoid the effort needed to solicit loan letters from financial institutions. It is a reason which effectively concedes that Onyx did not have the underlying documents to support its certification.

179. Onyx's other actions regarding its finances also demonstrate that it did not truthfully represent its reasons for not filing its financial showing on the due date, July 2, 1983. While it was arguing to the Presiding Judge that it did not need to provide the documents, Onyx was, on July 12, 1983, telling its lender, MCDI, that the Commission had required Onyx to file loan commitment letters and it asked MCDI to provide a current loan letter.

180. The evidence establishes, moreover, that Onyx repeatedly failed during 1981 and 1982 to inform the Commission about material aspects of its financial plan. This included deliberate efforts on Onyx's part to have its lenders revise their loan letters for the Commission to remove loan conditions that Onyx had agreed to. Specifically, Onyx withheld the following information from the Commission about its finances: (1) Onyx submitted a June 18, 1981 letter from Southeast Bank which did not explain that the loan was conditioned on the bank's review of onyx's cash flow projections and the financial statements of its principals. It was a filing that Onyx concedes was "not sufficient." (2) The September 17, 1981 letter from Southeast Bank reflected a determination made by the bank

on the basis of an unreported restructured financial plan for Onyx and the Commission was not informed that the loan was insufficient to meet the plan. (3) Southeast Bank suggested in July 1981 that Onyx's principals contribute $50,000 to establishing the station. Its principals agreed, but never informed the Commission. (4) Southeast Bank is to have a security interest in real estate owned by Onyx principals and assets to be acquired by the station. These conditions were not reported. And (5) Onyx asked its other lender, MCDI, to abbreviate the October, 1981 loan letter it prepared for filing with the Commission to eliminate seven non-negotiable conditions of the loan including matters governing location of its studio, insurance, the need for a matching private sector bank loan, and limitations on indebtedness without the consent of MCDI. The MCDI letter went through two revisions, and, when it was finally acceptable to Onyx, it was not filed for three months.[27]

181. There apparently never was a time, until October 1983, that the Commission had before it an accurate and reliable financial showing from Onyx. It is evident that Onyx concealed information about its financial proposal and that, when Onyx certified its finances, it did not have the underlying support for the certification. *See Global Broadcasting Group, Inc.*, 94 F.C.C. 2d 809, 811 (1983); *Belo Broadcasting Corporation*, 68 F.C.C. 2d 1479 (1978). Onyx's action, withholding and distorting information about its finances, is important primarily because it shows Onyx's repeated lack of credibility. It resolves any doubt that Onyx's reasons for not timely filing the underlying documents to support its certification were untruthful.

182. Insuring the financial qualifications of applicants is a statutory duty of the Commission. Onyx's evasive behavior effectively undermined the Commission's ability to carry out that duty; it is, moreover, past behavior that raises questions about the future reliability of Onyx filings and the willingness of Onyx to submit forthright and complete information to the Commission. *See RKO General, Inc. (WNAC)*, 78 F.C.C. 2d at 103. On this record, it cannot be concluded that Onyx would be a reliable licensee. Therefore, on a comparative basis, a substantial demerit attaches to Onyx's proposal.

Summary Consideration of Comparative Factors

183. While Onyx and First Black Broadcasters have no media interests and their owners are 100 percent integrated into management, they have exhibited behavior in this proceeding which indicates that they

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[27] Onyx concedes that some of the matters not reported in 1981 would have demonstrated that it was financially unqualified. In addition, the record reflects that Onyx principals could not have complied with some of the unreported conditions. For example, it was not established that Onyx's principals could contribute $50,000, and it is also not apparent that Onyx could, or would, meet the conditions of MCDI.

cannot be relied on to comply with regulatory laws and policies. The substantial demerits they have received for their dishonesty in filings in this proceeding outweigh the preferences they have received for their diversification and integration proposals over the proposals of Constance Woodlinger and South Florida Broadcasting.

184. On the basis of diversification of media, South Florida Broadcasting is entitled to a moderate preference over Constance Wodlinger. Two South Florida Broadcasting stockholders have interests in local media, but one, Judith Hernstadt, will not vote her stock in the proposed facility, she will not work at the station, and she exercises no control over the station licensed to her husband. Her 20 percent directly held interest in the local radio station, WKAT, which is 80 percent owned by her husband, William, she will sell. Francisco Soler's interest in the local, but small circulation, Spanish language monthly, *Miami Mensual*, is also of diminished importance to local diversity. South Florida will program in English and Mr. Soler will work only part-time at the station. On the other hand, Constance J. Wodlinger will own two radio stations in Kansas in addition to her proposed operation of the Miramar facility. Her important role as 100 percent owner and manager of the Miramar facility would result in a greater concentration of control of broadcast ownership and, therefore, diminished diversity, than would the proposal of South Florida.

185. Although South Florida's quantitative integration proposal is only 31 percent full time and 69 percent part-time compared to Wodlinger's 100 percent full-time proposal, South Florida's qualitative full-time and part-time integration is superior to Wodlinger's qualitative proposal. Elaine Bloom, who votes 31 percent of South Florida Broadcasting's stock and is proposed as the station's full-time general manager, lives in the service area and has exhibited a long-time extensive interest in the civic affairs of the community. She also has radio broadcast management experience. South Florida Broadcasting's proposal incorporates not just a local woman but also a local black woman and local Hispanic men and women into part-time positions. In addition, South Florida Broadcasting's part-time integrated stockholders, who represent 69 percent control, live in the primary service area, have participated in civic affairs, and some have had broadcast experience. In contrast, Ms. Wodlinger does not live in Miramar. However, she would move to Miramar and she, too, has broadcast experience at a management level. Comparatively, South Florida Broadcasting's qualitative proposal is superior and, overall, it diminishes the importance of Constance J. Wodlinger's quantitative superiority. Nevertheless, Constance J. Wodlinger is entitled to a slight to moderate preference over South Florida on the basis of her quantitative superiority.

186. However, because of South Florida Broadcasting's moderate preference on the more important diversification factor, South Florida Broadcasting is to be preferred over Constance J. Wodlinger, despite her slight to moderate integration preference. The Commission considers "an advantage under the diversification criterion generally to be more significant than a like integration [advantage]. This is so because under the Commission's *1965 Policy Statement on Comparative Broadcast Hearings* [1 F.C.C. 2d 393, 394 (1965)], diversification is considered a primary goal, whereas integration is only one of several factors predictive of the best practicable service to the public." *Gilbert Broadcasting Company,* 91 F.C.C. 2d 450, 468-9 (1982) (footnotes omitted). In addition, South Florida Broadcasting is entitled to a slight preference over Constance J. Wodlinger for its auxiliary power proposal. In all other respects Constance J. Wodlinger and South Florida Broadcasting are equal. The public interest would best be served by a grant of South Florida Broadcasting's application.

ACCORDINGLY, IT IS ORDERED that the motion for official notice filed February 7, 1984 by South Florida Broadcasting Company IS GRANTED.

IT IS FURTHER ORDERED that the petitions for leave to amend filed May 3, 1983 by Southwest Radio Enterprises, Inc., February 10, 1984 by Onyx Broadcasting of Miami, Inc. and April 9, 1984 by Constance J. Wodlinger ARE GRANTED and the amendments ARE ACCEPTED.

IT IF FURTHER ORDERED that the motion for enlargement of page limitation filed February 2, 1984 by South Florida Broadcasting IS GRANTED.

IT IS FURTHER ORDERED that the motion for leave to file statement correcting misstatement of fact filed March 7, 1984 by South Florida Broadcasting Company, Inc. IS GRANTED.

IT IS FURTHER ORDERED that the applications of Radiocentro Broadcasting Company (BPH-810630AJ), First Black Broadcasters of Miami, Inc. (BPH-810630AK), Constance J. Wodlinger (BPH-810630AT), Onyx Broadcasting of Miami, Inc. (BPH-810701AC), Rana Broadcasting Company, Inc. (BPH-810701AE), and Southwest Radio Enterprises, Inc. (BPH-810701AN) ARE DENIED.

IT IS FURTHER ORDERED that the application of South Florida Broadcasting Company (BPH-801427AJ) for a construction permit to operate an FM broadcast station on Channel 243C at North Miami, Florida IS GRANTED. This grant is conditioned on Judith Hernstadt selling her 20 percent interest in Hernstadt Broadcasting Company, the licensee of WKAT-AM, Miami Beach, Florida, before a construction permit is issued.[28]

FEDERAL COMMUNICATIONS COMMISSION

EDWARD J. KUHLMANN, *Administrative Law Judge*

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[28] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

AM Station, Technical Standards
Auditory Assistance Devices
Broadcasting, Re-Regulation
Deregulation
FM Station, Technical Standards
Television Station, Technical Standards

Report and Order adopted establishing general guideline principles to be used in future deregulation rule making proceedings and amending Parts 15, 73 and 74 of the Rules to eliminate unnecessary technical quality regulations. Guideline principles have been established for regulations relating to interference control, spectrum efficiency, interoperability and technical quality.
—*Technical Regulations*
GEN. Docket No. 83-114

FCC 84-521

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	
A Re-Examination of Technical Regulations	RM-1709 RM-2894 Gen. Docket No. 83-114

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1984; Released: December 7, 1984

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT.

Introduction

1. On February 17, 1983, the Commission adopted a *Notice of Inquiry and Proposed Rulemaking ("Notice")* in the above captioned matter requesting comments on the general concepts of technical regulation and proposing certain specific rule deletions in Parts 15 and 73.

2. This *Report and Order* (R&O) sets forth our analyses and conclusions on the general regulatory policies covered in the *Notice*, on the issue raised thereon in the comments and replies, and on the specific rule deletions proposed in the *Notice*. These general policies will help formulate additional deregulatory rulemaking proposals in related proceedings which will focus on particular categories of service and equipment.

3. We wish to emphasize that our principal objective in this and future proceedings of its kind is to eliminate unnecessary technical regulations and thereby create an environment that encourages innovation and avoids unnecessary and costly rulemaking. For several years the Commission has been examining all of its rules and policies and major deregulatory actions have resulted. It is our intention to extend our scrutiny to the area of technical regulation.

Procedural Matters

4. Four general points were expressed by the commenters dealing with nature and scope of this proceeding.[1] First, there were concerns that the *Notice* was either too broad in encompassing too many regulations, too narrow to achieve the Commission's goal, or ill-constructed to encourage commenters to respond to areas outside of their interests. Second, there were concerns that the regulations under consideration are intertwined, interdependent, and require complex assessment. Third, CBS and NAB, among others, believed there was the need for an advisory committee as a prerequisite for further action. Finally, several commenters argued for the retention of many technical regulations maintaining that Section 303 of the Communications Act mandates that the Commission regulate technical quality, interoperability and interference.

Discussion

5. In the *Notice* we divided the technical regulations into categories according to their primary purpose. The categories were interference control, spectrum efficiency, interoperability and signal quality. Understanding that a rule can serve more than one purpose, we employed a basic classification scheme that would facilitate the deregulatory efforts. On balance we believe this approach will work. Other approaches to classification were mentioned in the *Notice*. For instance, the rules could be divided functionally, rather than by purpose, into performance, design and conduct regulation.

6. Commenters generally seemed less interested in our methodology than what rules we proposed to eliminate. Many of the commenters complained that the *Notice* was too broad to allow adequate discussion of

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[1] See comment and reply comment lists in Appendices A and B.

all major areas of technical regulation. Indeed, the Notice was very broad. Its purpose was to provide an overview of the Commission's technical standards as well as a reasonable scheme for their examination. It was a vehicle to stimulate thought and acquaint the public with our intentions. Many of the comments concerned only rather narrow issues of particular concern to one area of regulation.

7. Some commenters warned that some technical rules are so intertwined with others that too specific a proceeding will prove useless. In general we observed that within each rule part there can be an often complex relationship between rules. In fact some of the rules we are deleting today can be dispensed with largely because we are keeping others. This seems not to be the case, however, between the rule parts themselves. In a sense, the very organization of the rules suggests a part by part approach.

8. Some commenters claimed the need for an advisory committee as a prerequisite for further action.[2] We feel that we can address the technical needs of specific services on a case-by-case basis using the traditional notice and comment procedure that ensures industry participation. Industry groups need not wait for rulemakings, however. We urge industry to use existing associations and standards organizations to consider and suggest possible changes to regulations in advance of Commission action.

9. With respect to arguments about the Commission's mandate, we note that Section 303 of the Act authorizes regulation over the external effects and the purity and sharpness of emissions of stations ". . . from time to time, as public convenience, interest or necessity requires." Clearly there is no requirement that we continue regulation in areas where we find such regulation is no longer in the public interest. We have the authority, if not an obligation, to review all of our technical regulations in light of changes that have occurred in telecommunications markets since these rules were adopted and to determine whether such regulations still serve the public interest.[3]

Interference Control

10. In the *Notice* we stated that "interference control is a valid, even essential, government function" and that existing technical regulations may be the most direct means of achieving interference control. Concern in the comments focused on the necessity to exercise caution in revising the present rule structure and the feasibility of specific types of rule changes.[4] We agree and reaffirm the key nature of our interference

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[2] See Comments of CBS and NAB.

[3] See e.g., *HBO, Inc. v. FCC*, 567 F.2nd 9,36 (D.C. Cir. 1977).

[4] See Comments of ABC, MIS, NAB, CBS, and Vincom.

prevention role and we intend to use all deliberate caution in reexamining our present rule structure. However, the present structure of narrowly defined emissions has also had a serious impact on technical innovation. We feel that our statutory mandate under Sections 1 and 303(g) of the Act requires us to consider new approaches to interference control. Any changes will be proposed in further rulemakings of a narrower scope than the Notice and will give all interested parties an opportunity to evaluate the effectiveness of the changes.

11. In the *Notice* we discussed the equivalent interference factor as an alternative to rigidly specified co-channel and adjacent channel separations and power limits. The concept of equivalent interference provides a mechanism by which a licensee would be able to use its transmitter, employing different forms of modulation, so long as no more interference would be caused than when operating with more conventional forms of transmission. To the extent this concept is employed, we will be able to eliminate the need for many rulemakings. Moreover, a licensee's or manufacturer's developmental plans would not have to be spread on a public record. Our staff is presently studying this approach in detail, and we expect to consider a more detailed proposal in further proceedings. We anticipate that it will be easier for the public to comment on a more detailed proposal limited to a single service category.

12. The *Notice* raised the possibility of relaxing frequency tolerance specifications where emission roll-off regulations were adequate to prevent adjacent channel interference. While one commenter supported this general concept, several others raised concerns of interference and a decrease in spectrum efficiency if more flexibility was allowed in this area. It was also pointed out that in services where AM and similar modulations with a strong carrier signal are used, frequency tolerance is essential to controlling interference from intercarrier beats. We recognize those concerns and will consider them in drafting any specific proposals in this area. We shall be especially careful in modifying stability rules in AM-like services susceptible to intercarrier beat.

Spectrum Efficiency

13. In the *Notice* we reasoned that ensuring technically efficient use of the spectrum justifies regulation in situations in which licensees lack incentives to voluntarily conserve spectrum and employ more spectrally efficient technologies. We also indicated that, where regulation of efficiency is warranted, it is less constraining to specify output or performance type standards, such as bits per second per hertz, rather than particular technologies, such as trunking or ACSB.

14. The comments generally confirmed the Commission's view that spectrum efficiency is a valid regulatory concern. Some also agreed that increasing licensee flexibility strengthens the incentive to use the

spectrum efficiently. Some commenters felt the Commission should take a more aggressive role in promoting and mandating spectrally efficient technologies, rather than relying on what those commenters perceived to be weak or non-existent marketplace incentives. Opinions were divided also on the most appropriate method of regulation. The general concept of regulating system output or performance rather than specifying a particular design or technology drew some support, although the complexities of defining and measuring spectrum efficiency were largely unaddressed.

15. Spectrum efficiency will be a valid reason for technical regulations as long as licensees incentives do not reflect the economic value of the spectrum and the corresponding incentive to be profligate in its use. Also the degree of regulatory control over efficiency will vary according to the particular service category. The same is true of the best method of regulation. We think, for example, that an output efficiency standard has little relevance in the context of the present television broadcasting service where technology is almost totally standardized to ensure interoperability goals. In other services, however, such a constraint may not apply. We are interested both generally and in this proceeding with all approaches to spectrum efficiency that rely on private incentives to use spectrum wisely.

Interoperability

16. In the *Notice* we defined interoperability regulations as technical rules that ensure that equipment owned by different entities are capable of operating together in the transfer of information. We pointed out that, where interoperability standards were desirable, they could be achieved by voluntary standards or mandatory regulations with different costs and benefits associated with each approach. However, in the case of interoperability mandated by law or treaty relating to emergency channels in the aeronautical and maritime mobile services, we clearly stated our intention of maintaining the *status quo*.[5]

17. Many parties argued the need for interoperability regulation in the broadcast services. Several parties raised issues of possible adverse

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[5] Several commenters stated a need for interoperability standards in the Private Land Mobile Service (PLMRS). However, the Commission has traditionally allowed PLMRS licensees a choice of a small number of enumerated modulation types; for example, we presently allow AM, FM, and digital modulation for these users (see §90.207 of our Rules). Our experience has shown that licensees understand their own interoperability requirements and purchase the types of radio equipment necessary to maintain interoperability within their fleets. Those few licensees who require interfleet interoperability have also been able to select equipment to meet their requirements. Thus, we see no need at this time for initiating direct FCC regulation of modulation choices in order to mandate PLMRS interoperability.

impacts on national security/emergency preparedness (NSEP) if the present level of interoperability were to diminish greatly, but none stated specifically what level of interoperability they felt was essential. A possible NSEP impact would be a serious concern to us and will have to be considered on a case-by-case basis as specific proposals are made in future proceedings. We urge those agencies in the NSEP area to start considering interoperability requirements for specific services so that an overview is available to guide us in this area in future notices.

18. Parties commenting on potential adverse affects of deleting the present broadcast interoperability requirements ranged from those who said that such regulation was essential for the interoperability of broadcasters and home receivers to those who said such regulation facilitated receiver design and lowered cost. Others argued that discontinuing the detailed regulation of broadcasting emissions would have little immediate effect on today's standards due to the interlocking nature of the system but would facilitate the introduction of evolutionary changes. It was noted also that the impediment to innovation could be alleviated by a liberal special temporary authority and waiver policy.

19. We are aware of the concerns about the cacophony that preceded the formal regulation of radio in the U.S. in 1927. While detailed regulation of broadcast emissions may have been helpful in introducing the services we have today, it is fair to question the continuance of this regulation in all cases. Between 1963 and 1983 there were thirteen R&O's modifying §73.687, the broadcast transmitter standards for television. This is because the detailed nature of the present rules requires a rulemaking for any minor signal format change even if it is compatible with existing receivers. This rigidity thus tends to delay innovation which may be compatible with existing equipment and to increase the burden on the Commission and the public.

20. As was pointed out above, the interlocking nature of today's system of broadcast transmitters and receivers is likely to discourage radical changes that would obsolete receivers. Nevertheless, we recognize the concern of the commenters. In future proceedings which may explore the possibility of decreasing the detail of present interoperability standards, we shall proceed with caution, carefully considering both the power and the limitations of market forces and the use of voluntary standards to achieve the desired balance of interoperability and flexibility.

Technical Quality

21. In the *Notice* we stated that, in general, the existence or nonexistence of adequate competition and diversity in the supply of a service or equipment is the principal, if not the only, significant factor in deciding whether to regulate the technical quality of that service or equipment. The only clear exceptions discussed were certain services and

equipment used by the public primarily for safety of life and property, such as aeronautical and maritime mobile, which we suggested may warrant regulation even if competitively supplied. We also stated the view that most services and equipment under our jurisdiction are sufficiently competitive to warrant deregulation of technical quality.

22. The comments raised several factors other than an absence of competition and diversity as reasons to regulate technical quality. One factor mentioned in several comments is the inability of purchasers to evaluate the quality of technically sophisticated products or to ensure they are getting the quality they want. There was concern that communications products are uniquely difficult for consumers because the devices owned or used by individuals are often only a part of a larger system about which the consumer has little information and over which he has no direct control. (For example, a television viewer experiencing poor quality reception may have difficulty determining whether the cause is the receiver or some other part of the system.) Regulating the quality of the transmitter, it is argued, eliminates one possible source of degradation and simplifies the problem for consumers.

23. This concern over system complexity will have to be considered in specific cases. However, we note that there are a wide variety of technologically complex systems sold today without federal quality regulations except in the safety area and that this nonregulation is generally successful. In some cases though, telecommunications systems do have the unique characteristic of being split ownership systems (*e.g.*, the broadcaster does not own the receiver) and this complicates the feasibility of identifying the source of a quality problem by the end user. However, in services where there is effective competition, there are still ways for the consumer to identify quality and choose the quality consistent with their needs.

24. Existing quality rules serve a useful function as engineering benchmarks for system designers. The regulation status of these standards also imposes a real cost in that it is time consuming and expensive to go through a formal notice and comment procedure to update them. Moving such quality rules to a nonregulatory status (e.g. voluntary standards) would facilitate their updating and in many respects accomplish the same benchmark function as today. Indeed voluntary quality standards already exist in many areas we do not regulate.[6]

25. Several parties expressed concern over the viability of competition in small broadcast markets and the possible need for continued quality regulation in such markets. We have addressed similar concerns in previous proceedings dealing with program deregulation in radio and

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[6] EIA studio transmitter link (STL) and land mobile radio standards.

television[7] and have found no need for a bifurcated approach. There is generally adequate competition between broadcasters and other suppliers of programming and entertainment.

26. Several commenters argued that, since broadcast licensees are trustees or stewards of the public airways, they should be required to maintain a minimum level of technical quality. While we agree that licensees have a responsibility to provide good quality service, we do not agree that such responsibility justifies direct regulation of technical quality. To the contrary, the pressure of competition and consumer choice have brought about a generally higher level of technical quality than required by our Rules.[8] The severe penalties imposed by the competitive marketplace on licensees who provide poor service make such behavior highly unlikely. Responsible conduct by broadcasters need not always be mandated by quantitative regulation.[9]

Guidelines

27. Based on the comments received and on our own long experience in the promulgation of technical regulations, we may reach some conclusions that should provide guidance in this and other proceedings. With respect to the broad categories of technical standards, our findings can be summarized in the following principles.

> *Interference* - The control of harmful interference between users of telecommunications services and equipment is a valid regulatory function of the highest priority. Technical regulations deemed essential to interference control will be retained but will be carefully examined to ensure they are not unnecessarily restrictive in areas unrelated to interference control.
>
> *Spectrum Efficiency* - Mechanisms to ensure spectrum efficiency are a high regulatory priority. However, explicit regulation of the spectrum efficiency of radio systems is not required where the following two conditions are both met: (1) licensees have an incentive to operate efficiently and (2) licensees are given the flexibility to choose the technical details of their system. Where significant flexibility is not possible and some regulatory control is necessary beyond merely setting the size of the channel assignment, the preferred type of regulation is one that specifies the required spectrum efficiency (*e.g.*, bits/second/Hertz) as opposed to a particular technology.
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> *Interoperability* - We attached a high priority to interoperability in many radio services, however, the priority of mandating specific interoperability through

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[7] *Deregulation of Radio*, 84 FCC 2d 968 (1981); *TV Deregulation*, 49 Fed. Reg.

[8] The Commission's technical quality rules were adopted some 40 years ago and established the absolute minimum quality standards that broadcasters are required to observe. Since then, state-of-the-art transmission facilities and technological innovations have exceeded, by far, many of the above requirements.

[9] *See Deregulation of Radio, Docket 79-219*, 84 FCC 2d at 97, and *Aural Power* Docket 83-117, ___ F.C.C. 2d ___ (adopted April 19, 1984) at para. 15. In both proceedings, the Commission found that licensees had adequate incentives to provide satisfactory signals and programming to their audiences without quantitative standards.

regulation varies depending on the service. Direct Commission regulation of interoperability is useful in several cases such as 1) in systems where instant communications between all stations is critical to safety (e.g. the maritime and aeronautical distress frequencies), 2) in systems where interoperability can be shown to be critical to national security/emergency preparedness concerns (e.g. the Emergency Broadcast Service), and 3) in helping the introduction of new services involving large public participation (e.g. cellular radio telephone service). In non-safety cases where we consider mandatory standards we will consider them on a case by case basis, and we will consider whether the benefits of standards outweighs the costs and time delay involved. We will seek to deregulate standards when (1) it can be determined that they are sufficiently well established to be maintained as voluntary standards and (2) enough equipment is installed to give manufacturers and service providers the incentive to make any new changes compatible with the original equipment. In these non-safety cases, we will also consider alternatives to mandatory standards that endorse or give a preference to a specific standard rather than requiring it.[10]

Technical Quality - While the Commission has the discretionary authority, in many cases, to regulate the technical quality of telecommunications services and equipment, we find that it is not generally in the public interest to do so. Exceptions to this are limited to cases where there are explicit statutory or treaty mandates or some other overriding factor such as safety of life and property. The provisions of most telecommunications equipment and services can be considered sufficiently competitive to consider deregulation of technical quality.

28. It must be emphasized that the principles we have just enunciated are intended to be understood not as dogma but as useful tools to help us in the future. It is not our desire to set adrift established industries and communications services. We intend an incremental approach to technical deregulation. We do not expect this deregulation to occur in a void. It can be assumed that responsible industry organizations will continue to develop and promulgate what they perceive to be useful voluntary standards. We anticipate that the Commission will coordinate this process with the appropriate industries and the standards organizations.

Specific Rule Changes

29. The *Notice* stated reasons for undertaking this review of the technical rules and regulations with the hope of modifying burdensome rules to stimulate technological innovation in communications and to create, to the maximum extent possible, an unregulated, competitive marketplace environment for the development of communications. The technical quality regulations are prime examples of rules that were needed at one time to foster the growth of an industry by providing common specifications for everyone. Indeed, especially in the broadcasting field where the transmitting and receiving equipment is designed and owned by different groups, the quality regulations provided standards for

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[10] See Multichannel TV Sound. See Second Report and Order, Docket 21323, (Adopted May 29, 1984), FCC 84-116.

the development of compatible transmitting and receiving equipment. Today, the broadcasting industry is mature. We are confident that the quality of broadcast stations will remain high. Never before have so many sources of entertainment been vying in the marketplace to please the consumer. Cable television, digital audio disks, VCR's, satellite programming, computer games, and other alternate sources of entertainment will provide the necessary incentive for broadcasters. Taking these factors into consideration, in the NPRM we proposed the deletion of various broadcast quality regulations as well as certain quality standards in Part 15 of the Rules. We turn now to a discussion of these regulations.

Section 73.40 - AM transmission system performance requirements

30. NAB argues that subparagraph 73.40(a)(2) must be retained because of the potential for interference to adjacent channels that would result from its deletion. ABES and Robert Jones, P.E., believe these are minimum standards and should be required of all licensees. NRBA does not favor the deregulation of Section 73.40 of the Commission's rules as proposed in the *Notice*. However, NRBA offers an alternative to the proposal, i.e., that a mere certification by the manufacturer that a broadcast transmitter meets the requirements of Section 73.40 would be sufficient to protect the broadcast licensees.[11] Cox indicated that this Section covers requirements for the general design of AM broadcast equipment as well as for providing the standard for checking equipment performance and, therefore, should be retained. Jules Cohen and Associates, P.C., object to the deletion of this Section, believing it to be necessary from the interference control and spectrum efficiency viewpoints. Motorola submits that eliminating the quality standards specified in Sections 73.40 and 73.128 of the Commission's rules would cast a pall of uncertainty over AM stereo as broadcasters and receiver manufacturers grapple with revised regulations. This could only degrade the quality of AM stereo. Thus, Motorola requests the above rules be retained. On the other hand, Harris agrees with the Commission that marketplace competition has brought about higher standards and agrees with the proposed deletions. CBS, like Harris, also favors relaxed quality standards believing that the proposed rules are generally surpassed by present transmission equipment and should be deleted.

31. An analysis of those regulations proposed for deletion in §73.40(a) is as follows: Subparagraph (1) describes the minimum level of modulation of which a transmitter must be capable. A broadcaster operating below

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[11] This form of "certification" has already been provided. Broadcast transmitters are now authorized by a grant of notification instead of type acceptance. See Report and Order, Gen. Docket No. 83-10, adopted January 10, 1984, FCC 84-21, 49 FR 3991 published February 1, 1984.

this modulation level would experience a decrease in coverage area. Thus, there is an economic incentive for the broadcaster to continue to meet this specification, even without a quantitative requirement, and we feel that operation at a low modulation level is unlikely. Subparagraph (2) specifies the maximum permissible level of harmonic distortion, subparagraph (5) limits noise on the transmitted signal, and subparagraph (4) specifies the degree of carrier amplitude regulation for the transmitter. Some of the commenters argued that deletion of these rules would lead to interference to channels adjacent to the broadcaster whose signal did not comply. We believe that this will not happen because, first, we are retaining the provisions of §73.44(a) which directly limit emissions on adjacent channels and, second, any transmission which is of such poor quality that it causes interference on adjacent channels will also appear to be of poor quality to the intended listeners and will affect the broadcasters own audience by making his signals virtually unusable.

32. Subparagraph (3) concerns the frequency response characteristics of the broadcast transmitter. This is a quality standard and variance from it has no potential for increasing the level of interference to other stations. It is believed that the marketplace incentives are sufficient for the broadcaster to determine the "flatness" of the frequency response absent regulation. Regardless, audio processing by the broadcaster could be used to change the frequency response under the existing regulations. This rule, therefore, can be deleted.

33. Accordingly, after review of the comments we still believe that the marketplace forces are sufficient to ensure that broadcasters will continue to meet high quality standards without Commission regulation. Therefore, subparagraphs 73.40(a)(1) through (a)(5) will be deleted, as proposed. These deleted standards apply only to monophonic AM operation. Changes to the specifications relating to stereophonic AM operation were not proposed in the *Notice* but will be considered in a future proceeding.

Section 73.317 - FM transmission system requirements

34. Except for CBS and Harris, the majority of commenters opposed the Commission's proposal to eliminate subparagraphs (a)(1) through (a)(5) of this Section. They believed that: a) subparagraph 73.317(a)(1) should be retained because it directly affects interference to adjacent FM channels; b) subparagraph 73.317(a)(2) deals with pre-emphasis standards which are required to ensure interoperability among various pieces of equipment and, therefore, should be retained; and, c) subparagraphs 73.317(a)(3) through (a)(5) must be retained as guidelines in order to determine performance objectives. Harris and CBS believe that the above subparagraphs are generally surpassed by present transmission equipment and should be deleted. CBS regards as unclear the impact of

removing subparagraph 73.317(a)(2) but concludes that its deletion would be preferable to its retention.

35. Under Section 73.317(a), subparagraphs (1), (3), (4), and (5) deal with the transmitter characteristics of minimum level of modulation, harmonic distortion, frequency modulated noise, and amplitude modulated noise, respectively. For the same reasons as discussed for Section 73.40, the broadcaster has an economic incentive to maintain these specifications without the need for Commission regulation. However, subparagraph (a)(2) deals with the pre-emphasis applied to modulating signal with a corresponding de-emphasis contained in the receiver. This standard ensures interoperability between the receiver and the transmitter, and that portion related to pre-emphasis will be retained at this time. While the broadcaster can still use audio processing to change the characteristics of the received signal, the retention of this standard will ensure that the recovered signal will be the same as that processed audio supplied by the broadcaster. It is not necessary to retain the minimum frequency response requirement which is also contained within this regulation. Frequency response is clearly a quality standard that need not be mandated by the Commission. Accordingly, it is appropriate to delete subparagraphs (a)(1) and (a)(3) through (a)(5) and revise subparagraph (a)(2) of Section 73.317 and defer to the marketplace. We will consider possible further modification of the pre-emphasis standard of subparagraph (a)(2) in a future proceeding which will review the FM service technical standards in depth. However, we are modifying the pre-emphasis requirements as per the attached appendix because we find that it is in the best interest of the broadcaster to adhere to the pre-emphasis characteristics as closely as possible.

Section 73.687 - TV transmission system requirements

36. NAB argues that television transmission system performance regulations should be retained, and that subparagraphs 73.687(a)(1) and (a)(2) are essential to the design of television transmission systems with possible interference control implications. NAB argues that subparagraph 73.687(a)(3) governs out-of-band radiation from television stations, and its purpose is to control interference; subparagraph 73.687(a)(4) provides measurement procedure to demonstrate compliance with the provisions of subparagraph 73.687(a)(3); subparagraph 73.687(a)(5), while not specifically related to interference to other stations, must be maintained as a guideline; subparagraph 73.687(a)(6) indirectly controls interference to adjacent channels; subparagraphs 73.687(a)(7) through (a)(9) assure compatibility between stations and receivers; subparagraphs 73.687(b)(1) indirectly controls interference to upper adjacent televisions channels; and, subparagraph 73.687(b)(2) defines the audio pre-emphasis curve which is used as a design criterion by television transmitter and receiver

manufacturers. Lastly, subparagraphs 73.687(a)(3) through (a)(7) contain aural transmitter performance objectives and measurement procedures. Other commenters hold similar views and urge the Commission to retain these standards. The Association of Maximum Service Telecasters (ASMT) holds a different view regarding subparagraphs 73.687(a)(1), (2) and 73.687(b)(1), and (3) through (9). AMST states that although these standards may not serve the goals of interference prevention, spectrum efficiency or interoperability, they are good indicators for judging station performance. CBS supports the proposed deletion of Paragraphs 76.687(a) and (b) as being either too loose to be of any real significance or too well established to be needed any longer.

37. Under Section 73.687(a), subparagraphs (1) and (2) specify the shape of the demodulated video signal. While severe deviations from the existing regulations could adversely affect the television reception of the broadcaster involved, these subparagraphs are primarily concerned with signal quality. Any degradation of these signal specifications would affect the picture quality, providing the broadcaster with an economic incentive to maintain these standards without Commission regulation. Subparagraph (9) states that the video input signal and the transmitted video signal should have a linear relationship. Again, this is a matter of quality that need not be addressed by regulation.

38. Section 73.687(b) regulates the characteristics of the transmitted television aural signal. The subparagraphs are identical to those employed for the FM broadcast service under Section 73.317(a) with the same interference or quality concerns. Accordingly, we will again defer to the marketplace for subparagraphs (a)(1), (a)(2), (a)(9), (b)(1), part of (b)(2), and (b)(3) through (b)(5) of Section 73.687. On the other hand, our review of subparagraphs (a)(3) through (a)(8) and (b)(2) suggests that these rules, to one extent or another, are intended not only to improve quality but to prevent interference, and promote interoperability. However, we are modifying the pre-emphasis requirement to be parallel to the change we are making in the FM service which we described in paragraph 35. These subparagraphs will be reviewed again in a future proceeding dealing with television technical regulations and will be retained in the interim.

Miscellaneous Broadcasting Matters

39. NAB and AMST suggested that the technical description on many quality regulations proposed for deletion should at least be maintained in some manner as guidelines or voluntary standards of good engineering practices that can serve as a reference for system designers. It would be preferable if the needed standards were eventually incorporated into existing or new publication by the voluntary standards development organizations (*e.g.*, EIA, IEEE, NAB, etc.). However, it may not be possible to do this at an early date, and the Commission may have to fill

the void between the time when the technical standards are removed from the Regulations and the time that they appear in publications of the voluntary standards organizations. The Commission can make the standards available for the guidance of and use by the private sector. These standards would be issued in the form of Office of Science and Technology (OST) Bulletins and would contain the information removed from the rules. It is planned that publication of these Bulletins would continue only so long as the information was found to be needed and was not available from a private sector publication.

40. Consequent to our decision to delete the pertinent subparagraphs of Sections 73.40, 73.317 and 73.687 of the Commission's rules, as outlined above, we are also deleting as moot the licensee proof of performance requirements of Section 73.1590(b)(l)(1), (ii), (iii), (iv); (b)(3)(i), (ii), (iii), (iv); (c)(1) and (c)(6). We are revising subparagraph (b)(3) of Section 73.1570 of the Commission's rules to define the total modulation of the aural carrier for monophonic TV transmitters which was previously defined in §73.687. Additionally, we take this opportunity to dismiss as moot two pending petitions for rule making (RM-2894 and RM-1709, filed by the NAB and Christopher Philip Payne respectively), urging the Commission to revise its "audio fidelity rules." These rules are deleted herein.

Sections 15.361, 15.363, and 15.365 - Auditory Assistance Devices

41. In addition to the Part 73 matters discussed above, the *Notice* proposed to delete Sections 15.361, 15.363, and 15.365 which specify standards for frequency stability, selectivity and densensitization, and image frequency responses, respectively, for auditory assistance receivers. We have classified these regulations under the category of minimum quality standards. Their proposed deletion is consistent with the idea that control of the technical quality of certain competitively supplied equipment can be satisfactorily obtained through marketplace forces and need not be mandated by the Commission.

42. Comments concerning these proposals were filed by NAB, Phonic Ear, Inc., and Williams Sound Corp. Williams Sound Corp. supported our proposal and agreed with our belief that these technical parameters could be controlled through the marketplace forces. The other commenting parties opposed the deletion of these rules stating that these rules are related to interference rather than quality and that, in any case, the special needs of the hearing impaired justify this form of regulation.

43. We agreed that the specified regulations address the matter of the degree of interference experienced by the receiver. However, these rules are concerned with the quality of reception rather than a source of interference to other radio operations. Generally, standards for controlling interference from transmitters address the matter of radio frequency

emissions and the effects of those emissions on other users of the spectrum. In this case, these receiver rules address the ability of the receiver to reject an interfering signal and are directly related to the quality of the received signal. Thus, these regulations are correctly classified as minimum quality standards. It should be noted that we are not dealing here with home electronic equipment. Such devices may be regulated with respect to susceptibility to interference pursuant to Section 302 of the Communications Act.

44. It is believed that the special needs of the hearing impaired will be more effectively addressed by the deletion of these Part 15 regulations. This will provide the users with the advantage of having a range of cost/performance combinations which may meet their needs better than a single standard design. Under the proposal being implemented by this action, auditory assistance users will be able to purchase the degree of receiver protection required for their particular needs. The retention of mandatory standards would not allow these distinctions to be made and would place the Commission in the position of having to make a single cost/performance trade-off based upon worse case assumptions. Should the potential users of auditory assistance devices be located in an area that is relatively clear of interfering signals or need only one or two channels, a less expensive receiver with relaxed specifications might be more suitable for their needs. Should the users be located in an area with a high level of radio frequency congestion or should they wish to install a multichannel system, a more expensive receiver system with specifications similar to those contained in the concerned regulations may be desired. Therefore, we will defer to the marketplace and are deleting Sections 15.361, 15.363 and 15.365 of the regulations.[12]

Ordering Clauses

45. Accordingly, IT IS ORDERED, pursuant to the authority contained in §§4(i), 302 and 303 of the Communications Act of 1934, as amended, that Parts 15, 73 and 74 of the Commission's Rules ARE AMENDED, effective December 7, 1984, as shown in Appendix C. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

46. IT IS ORDERED that RM-1709 and RM-2894 ARE DISMISSED.

47. The Secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief

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[12] The Commission has neither the expertise nor the primary jurisdiction to promulgate health and safety standards for auditory assistance devices. We shall defer to the expertise of the Federal health and safety agencies in the establishment of such standards. If such standards are adopted we would expect equipment submitted for FCC approval to comply with all applicable Federal standards, e.g., performance standards adopted by the appropriate divisions of the U.S. Department of Health and Human Service or safety standards adopted by the Consumer Product Safety Commission.

Counsel for Advocacy of the Small Business Administration in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C., *et seq.*).

48. Further information on this matter may be obtained by contacting Michael J. Marcus, (202) 632-7040, or John A. Reed, Office of Science and Technology, (202) 653-6288, or John A. Karousos, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendices A&B-may be seen in FCC Dockets Branch, 1919 M Street, N.W., Washington, D.C.

APPENDIX C

A. Title 47 of the Code of Federal Regulations, Part 15, is amended as follows:

1. Section 15.333 is amended by revising paragraph (b) to read as follows:

§15.333 Operation in the band 72-76 MHz.

* * * * *

(b) A receiver may be operated as part of an auditory assistance system provided it meets the technical specifications in §15.367 and is certified pursuant to §15.345.

2. Sections 15.361, 15.363 and 15.365 are deleted in their entirety.

B. Title 47 of the Code of Federal Regulations, Part 73, is amended as follows:

1. Section 73.40 is amended by revising paragraph (a) and subparagraphs (b)(2) and (3), and by deleting subparagraphs (a)(1), (2), (3), (4), and (5) to read as follows:

§73.40 AM transmission system performance requirements.

(a) Stations must annually show compliance with §73.44. These emission limitations must be met under any conditions of modulation expected to be encountered by the station.

(b) * * *

* * * * *

(2) For main channel modulation only, the total audio frequency distortion from terminals to antenna output shall not exceed 5% harmonics (voltage measurements of arithmetical sums or r.s.s.) when modulated from 0 to 84% and shall not exceed 7.5% harmonics (voltage measurements of arithmetical sum or r.s.s.) when modulating 85% to 95% (distortion shall be measured with modulating frequencies of 50, 100, 400, 1000, 5000 and 7500 Hz up to tenth harmonic or 16,000 Hz, or any intermediate frequency that readings on these frequencies indicate is desirable). Harmonics should be observed to 20,000 Hz. When stereophonic transmission is used, the distortion must be measured in the left and right channels separately using a suitable stereophonic demodulator.

(3) The audio frequency transmitting characteristics for main (L+R), left (L) only and right (R) only modulation shall not depart more than 2 dB from that at 1000 Hz between 100 and 7500 Hz.

* * * * *

2. Section 73.317 is amended by deleting subparagraphs (a)(1),(3),(4) and (5) and subdivisions (a)(3)(i) and (ii), and by revising subparagraph (a)(2) as subparagraph (a)(1) and redesignating subparagraphs (a)(6) through (14) as subparagraphs (a)(2) through (10) to read as follows:

§73.317 Transmission system requirements.

(a) * * *

(1) Pre-emphasis shall be employed as closely as practicable in accordance with the impedance- frequency characteristic of a series inductance- resistance network having a time constant of 75 microseconds. (See upper curve of Fig. 2 of §73.333.)

(2) Automatic means shall be provided in the transmitter to maintain the assigned center frequency within the allowable tolerance (±2000 Hz).

(3) [Reserved]

(4) Adequate provision shall be made for varying the transmitter output power to compensate for excessive variations in line voltage or for other factors affecting the output power.

(5) Adequate provision shall be provided in all component parts to avoid overheating at the rated maximum output power.

(6) Means should be provided for connection and continuous operation of a modulation monitor.

(7) If a limiting or compression amplifier is employed, precaution should be maintained in its connection in the circuit due to the use of pre- emphasis in the transmitting system.

(8) Any emission appearing on a frequency removed from the carrier by between 120 kHz and 240 kHz inclusive shall be attenuated at least 25 dB below the level of the unmodulated carrier. Compliance with this specification will be deemed to show the occupied bandwidth to be 240 kHz or less.

(9) Any emission appearing on a frequency removed from the carrier by more than 240 kHz and up to and including 600 kHz shall be attenuated at least 35 dB below the level of the unmodulated carrier.

(10) Any emission appearing on a frequency removed from the carrier by more than 600 kHz shall be attenuated at least 43 + 10 Log_{10} (Power in watts) dB below the level of the unmodulated carrier, or 80 dB, whichever is the lesser attenuation.

(b) * * *

* * * * *

3. Section 73.687 is amended by deleting subparagraphs (a)(1),(2),(9),(b)(1),(3),(4) and (5), and subdivisions (b)(3)(i) and (ii); by redesignating subparagraphs (a)(3) through (a)(8) as subparagraphs (a)(1) through (a)(6); by revising and redesignating subparagraphs (b)(2) as subparagraphs (b)(1); and, by redesignating subparagraphs (b)(6) and (b)(7) as subparagraphs (b)(2) and (b)(3), respectively, to read as follows:

§73.687 Transmission system requirements.

(a) * * *

(1) The field strength or voltage of the lower sideband, as radiated or dissipated and measured as described in paragraph (a)(2) of this section, shall not be greater than −20 dB for a modulating frequency of 1.25 MHz or greater and in addition, for color, shall not be greater than −42 dB for a modulating frequency of 3.579545 MHz (the color subcarrier frequency). For both monochrome and color, the field strength or voltage of the upper sideband as radiated or dissipated and measured as described in paragraph (a)(2) of this section shall not be greater than −20 dB for a modulating frequency of 4.75 MHz or greater. For stations operating on Channels 15-69 and employing a transmitter delivering maximum peak visual

power output of 1 kW or less, the field strength or voltage of the upper and lower sidebands, as radiated or dissipated and measured as described in paragraph (a)(2) of this section, shall depart from the visual amplitude characteristic (Figure 5a for §73.699) by no more than the following amounts:

–2 dB at 0.5 MHz below visual carrier frequency;

–2 dB at 0.5 MHz above visual carrier frequency;

–2 dB at 1.25 MHz above visual carrier frequency;

–3 dB at 2.0 MHz above visual carrier frequency;

–6 dB at 3.0 MHz above visual carrier frequency;

–12 dB at 3.5 MHz above visual carrier frequency;

–8 dB at 3.58 MHz above visual carrier frequency (for color transmission only).

The field strength or voltage of the upper and lower sidebands, as radiated or dissipated and measured as described in paragraph (a)(2) of this section, shall not exceed a level of –20 dB for a modulating frequency of 4.75 MHz or greater. If interference to the reception of other stations is caused by out-of-channel lower sideband emission, the technical requirements applicable to stations operating on Channels 2-13 shall be met.

(2) The attenuation characteristics of a visual transmitter shall be measured by application of a modulating signal to the transmitter input terminals in place of the normal composite television video signal. The signal applied shall be a composite signal composed of a synchronizing signal to establish peak output voltage plus a variable frequency sine wave voltage occupying the interval between synchronizing pulses. (The "synchronizing signal" referred to in this section means either a standard synchronizing wave form or any pulse that will properly set the peak.) The axis of the sine wave in the composite signal observed in the output monitor shall be maintained at an amplitude 0.5 of the voltage at synchronizing peaks. The amplitude of the sine wave input shall be held at a constant value. This constant value should be such that at no modulating frequency does the maximum excursion of the sine wave, observed in the composite output signal monitor, exceed the value 0.75 of peak output voltage. The amplitude of the 200 kHz sideband shall be measured and designated zero dB as a basis for comparison. The modulation signal frequency shall then be varied over the desired range and the field strength or signal voltage of the corresponding sidebands measured. As an alternate method of measuring in those cases in which the automatic d-c insertion can be replaced by manual control, the above characteristic may be taken by the use of a video sweep generator and without the use of pedestal synchronizing pulses. The d-c level shall be set for midcharacteristic operation.

(3) A sine wave, introduced at those terminals of the transmitter which are normally fed the composite color picture signal, shall produce a radiated signal having an envelope delay, relative to the average envelope delay between 0.05 and 0.20 MHz, or zero microseconds up to a frequency of 3.0 MHz; and then linearly decreasing to 4.18 MHz so as to be equal to –0.17 μsecs at 3.58 MHz. The tolerance on the envelope delay shall be ±0.05 μsecs at 3.58 MHz. The tolerance shall increase linearly to ±0.1 μsec down to 2.1 MHz, and remain at ±0.1 μsec down to 0.2 MHz. (Tolerances for the interval of 0.0 to 0.2 MHz are not specified at the present time.) The tolerance shall also increase linearly to ±0.1 μsec at 4.18 MHz.

(4) The radio frequency signal, as radiated, shall have an envelope as would be produced by a modulating signal in conformity with §73.682 and Figure 6 or 7 of §73.699, as modified by vestigial sideband operation specified in Figure 5 of §73.699. For stations operating on Channels 15-69 the radio frequency signal, as radiated, shall have an envelope as would be produced by a modulating signal in conformity with §73.682 and Figure 6 or 7 of §73.699.

(5) The time interval between the leading edges of successive horizontal pulses shall vary less than one half of one percent of the average interval. However, for color transmissions, §73.682(a)(5) and (6) shall be controlling.

(6) The rate of change of the frequency of recurrence of the leading edges of the horizontal synchronizing signals shall be not greater than 0.15 percent per second, the frequency to be determined by an averaging process carried out over a period of not less than 20, nor more than 100 lines, such lines not to include any portion of the blanking interval. However, for color transmissions, §73.682(a)(5) and (6) shall be controlling.

(b) * * *

(1) Pre-emphasis shall be employed as closely as practicable in accordance with the impedance-frequency characteristic of a series inductance-resistance network having a time constant of 75 microseconds. (See upper curve of Figure 12 of §73.699.)

(2) If a limiting or compression amplifier is employed, precaution should be maintained in its connection in the circuit due to the use of pre-emphasis in the transmitting system.

(3) Aural modulation levels are specified in §73.1570.

* * * * *

4. Section 73.1570 is amended by revising subparagraph (b)(3) to read as follows:

§73.1570 Modulation levels: AM, FM, and TV aural.

* * * * *

(b) * * *

* * * * *

(3) TV station. In no case shall the total modulation of the aural carrier exceed 100% on peaks of frequent recurrence, unless some other peak modulation level is specified in an instrument of authorization. For monophonic transmissions, 100% modulation is defined as ± 25 kHz.

* * * * *

5. Section 73.1590 is amended by deleting subdivisions (b)(1)(i), (ii), (iii), (iv), and (b)(3) (i), (ii), (iii), (iv), and subparagraphs (c)(1) and (c)(6) and marking them [Reserved]; and, by revising subdivisions (b)(2)(ii) and (iii) to read as follows:

§73.1590 Equipment performance measurements.

* * * * *

(b) * * *

(1) * * *

(i) [Reserved].

(ii) [Reserved].

(iii) [Reserved].

(iv) [Reserved].

(v) * * *

(2) * * *

(i) * * *

(ii) Data and curves showing audio frequency harmonic content for 25%, 50%, 75% and (main channel only) 100% modulation for the audio frequencies 50, 100, 400, 1000, 5000, and when attainable 7,500 10,000, 12,000 and 15,000 Hz (either arithmetical or RSS (root sum square)) value up to the 10th harmonic or 30,000 Hz) for equal left and right (L=R), left (L)

only and right (R) only signals. A family of curves must be plotted (one for each percentage above) with percent distortion as ordinate and audio frequency as abscissa.

(iii) Data showing percentage of carrier amplitude regulation (carrier shift) for 25, 50, 85 and, if obtainable, 100% modulation with 400 Hz tone for main channel modulation with equal left and right (L = R) signals.

* * * * *

(3) * * *

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

(iv) [Reserved]

(v) * * *

(c) * * *

(1) [Reserved]

* * * * *

(6) [Reserved]

* * * * *

C. Title 47 of the Code of Federal Regulations, Part 74, is amended as follows:

Section 74.750 is amended by revising subparagraph (d)(1) to read as follows:

§74.750 Transmission system facilities

* * * * *

(d) * * *

(1) The equipment shall meet the requirements of paragraphs (a)(1) and (b)(3) of §73.687.

* * * * *

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In re: Report and Order in General Docket 83-114 to review the Commission's technical rules and regulations

This document purports to remove needless regulation from certain technical operations in the broadcast industry. Indeed, time and technological advances have served to improve certain equipment to the point where licensees can meet many of our minimum standards with ease.

Many of the comments in this docket have raised serious questions about the advisability of walking away from certain well established standards simply because burdens, usually very small ones, are incurred. I share those concerns because I continue to have a pride in the general quality of our broadcasting services and I do not wish to see that quality diminished. I concede that individual licensees have incentives to maintain high quality service. They also have competing incentives to cut costs. Our minimum technical standards tend to order a balancing of these incentives to the benefit of the American public.

Fortunately, the Report and Order does not reflect the full sweep of technical deregulation in the Notice of Proposed Rulemaking. For example, Section 73.687(a)(3) through (a)(8) and (b)(2) are not being deleted because of valid interference and interoperability concerns.

I cannot subscribe to some of the guidelines enunciated in this document. The Commission's desire to delete rules relating to technical quality is, I believe, a mistake. I also believe the Commission has a legitimate interest in the interoperability of various systems. While I do subscribe to the guideline that says mechanisms to ensure spectrum efficiency are a high regulatory priority, I do not believe that adequate incentives exist to use spectrum efficiently absent regulation.

I bow to the wishes of my colleagues to remove regulations which have proven to be unnecessary and burdensome. There are specific instances in this document where we may have gone too far but I believe they are sufficiently limited so as to permit the Commission to reimpose regulation in a timely fashion should that be necessary.

Therefore, I concur.

Candor
Nondisclosure
Technical Requirements

In hearing matter of mutually exclusive CP applications for FM station, Review Board affirmed ALJ's grant. Losing applicant disqualified for lack of candor in coloring testimony that it could obtain a transmitter site lease and for failing to notify the Commission of a letter formally denying applicant use of the land for a transmitter site.

—*Valley FM Radio*
BC Docket No. 80-379

FCC 84R-86

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Valley FM Radio Taft, California	BC Docket No. 80-379 File No. BPH-790308AH
Louise E. Mann t/a Mann Broadcasting Co. Taft, California	BC Docket No. 80-380 File No. BPH-790730AA
For Construction Permit for a New FM Station	

Appearances

David Tillotson on behalf of Valley FM Radio and *Morton L. Berfield* on behalf of Mann Broadcasting Co.

DECISION

Adopted: November 27, 1984; Released: December 4, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL

BOARD CHAIRMAN MARINO:

1. This case returns to the Review Board following a remand hearing to probe whether Valley FM violated the Commission's reporting requirements, was lacking in candor, or misrepresented facts concerning the availability of its proposed transmitter site. *Valley FM Radio*, 93 FCC 2d 1330 (Rev. Bd. 1983). After a trial-type hearing Administrative Law Judge Harrison issued a Supplemental Initial Decision, FCC 84D-34, May 25, 1984, which found that (a) at the original hearing Valley had lacked candor when it colored its testimony to indicate that the landowner would grant it a lease for its proposed transmitter site; (b) Valley failed to notify the Commission of a letter from the land owner formally denying Valley the use of the land for a transmitter site; and (c) in subsequent proposed findings of fact Valley continued to misrepresent the facts regarding the availability of the transmitter site. ID. Concl. 2-7. Nor did the ALJ find any excuse for this misconduct since Valley had previously "been through two rounds of hearing on failure to report, lack of candor and misrepresentation issues." Supp. Id. Find. 15, Concl. 4, 6. We affirm the ALJ's denial of Valley's application which is consistent with controlling precedent, and conclude that Mann Broadcasting is basically qualified.

2. *Valley's Basic Qualifications*: Valley's exceptions to the Supplemental I.D., (S.I.D.) which were filed *pro se* on June 29, 1984, do not challenge any of the ALJ's detailed and concrete factual findings. See S.I.D. finds. 8-17. Briefly summarized, those findings establish, first, that in 1981 Valley's 100% owner, Fuss, had testified at the original hearing that the landowner, Chevron USA, was likely to grant a lease, and would "upon approval of their other operating departments, grant Valley a lease on the terms that we basically discussed, roughly $100 a month with defernment of payment." S.I.D., find. 9. In fact, that testimony failed to disclose that on February 3, 1981, some ten days earlier, Chevron had sent a letter to Valley indicating that there was only a mere possibility of a lease, and that Valley would receive a more definite answer during the next several weeks. S.I.D., finds. 13, Concl. 2.

3. Second, on March 19, 1982, Valley's owner did receive a letter from Chevron formally denying use of the site. He immediately telephoned the appropriate Chevron official who neither encouraged nor discouraged him, but only listened. Valley's owner then wrote that official what the ALJ correctly characterized as a self-serving letter which did not appear to be calculated to draw an authoritative response from Chevron. And thereafter he made no further effort to clarify the site question until after the filing of the request to reopen the hearing. S.I.D., Find. 14, Conc. 3.

4. Third, although familiar with the Commission reporting requirements, SID, Find. 15, Valley's owner failed to notify either his own communications counsel, or the Commission about the March 1982 letter from Chevron flatly denying Valley use of its proposed site. As a result

Valley later filed proposed findings of fact with the ALJ which continued to misrepresent that "Valley can lease the site directly from Chevron Oil for $100 per month. S.I.D., Conc. 4, 5. (The $100 per month rental figure was apparently conjured solely by Valley. Tr. 2343)

5. No extenuating circumstances were found by the ALJ who observed the witnesses both at the original and remand hearings; on the contrary, the ALJ found that Valley was familiar with the reporting and candor requirements because of its previous hearing experience. And despite "two rounds of hearing on failure to report, lack of candor and misrepresentation" for which it was assessed a comparative demerit, S.I.D. Finds. 15, Conc. 4, 6, it later failed to disclose the Chevron denial letter. Accordingly, the ALJ concluded that the Section 1.65 reporting "violation as now developed in this [remand] record warrants disqualification," and that the concealment of that letter led to "the continuing misrepresentation, implicit and explicit, by Valley as to the availability of its antenna site." S.I.D., Conc. 7.

6. Valley's exceptions claim that its owner had no motive or intent to deceive since he was aware of other potential sites in the area. Supp. Exceptions p. 1, TR. 2338-9. Valley does agree that it made a serious error "in not pursuing a formal, written, objective statement from Chevron of its determination" and even concedes that it "may well be due a serious comparative demerit for [its owner's] failure to actively pursue a formal, written agreement from Chevron," Except. pp 3-4; however, it should not be disqualified for failure to report, lack of candor, or misrepresentation. At oral argument on October 30, 1984, Valley was once again represented by communications counsel who argued that: "The real issue here is what did [Valley's owner] believe in his mind at the time he received the letter from Chevron . . . . concerning the likelihood that he would be able to keep that site." Tr. 2333. Counsel later stressed that: "the point is, again, what was in his mind. He testified that when he got done with the phone call he thought . . . he could work it out with Chevron." Tr. 2338.

7. *Discussion*: The Review Board will affirm the ALJ's denial of Valley's application because objective and documentary record evidence establishes a pattern of deliberate and repeated violations of Section 1.65 of the Commission's Rules. *Merrimack Valley*, 55 RR 2d 23, 25 (1983) and Remand, FCC 84-496, released October 23, 1984. This reporting requirement was adopted nearly two decades ago to insure that radio applicants file timely reports about decisional changes in information previously submitted. It also contributes "to administrative fairness in comparative cases by keeping applicants informed about the true nature of their competition through the hearing process." *Bay Television, Inc.*, 95 FCC 2d 181, (Rev. Bd. 1983).

8. Here Valley had actual notice of the Commission's reporting and candor requirements since at the original hearing it had failed to file information about changes in its financial qualifications, and after it was heard on that question, received a comparative demerit for that fault. ALJ's Conc. 6. Valley left that hearing room, after the trial of the reporting and candor issue, and immediately ignored the Commission requirements with regard to decisional changes about its proposed transmitter site. *Compare George E. Cameron, Jr.*, 89 FCC 2d 1270, para. 9 (Rev. Bd. 1982).

9. The remand record establishes, as found by the ALJ, that Valley had in its possession two letters from Chevron officials which were squarely inconsistent with testimony and proposed findings of fact which had been offered at the original hearing by Valley. It failed to disclose those letters as required, and even if we were to accept counsel's argument and assume that Valley's owner subjectively believed that Chevron had agreed "to keep the door open" on reconsideration of its denial of the proposed site, Valley would not be excused for its failure to inform the Commission about not one but two letters which more accurately disclosed the actual status of the negotiations with Chevron. See *Bay Television Inc., supra,* 95 FCC 2d at 185, and *Shoblom Broadcasting, Inc.* 95 FCC 2d 444 (Rev. Bd. 1983), where failure to disclose similar documentary evidence which was inconsistent with the applicants' hopes or desires was severely sanctioned. *See also Peoples Broadcasting Corp.*, 52 RR 2d 1617 (Rev. Bd. 1983).

10. The two letters from Chevron previously mentioned revealed a different picture of the negotiations with Chevron from the tale being spun out at the same time by Valley's oral and written representations to the Commission. On remand the ALJ wisely focused on these objective letters rather than the subjective tale which emerged from Valley's owner. (Compare *Vincent J. Beard*, FCC 84R-80, November 6, 1984, documentary evidence in licensee's "cupped left hand.") This objective documentary evidence firmly supports the ALJ's conclusion that Valley colored its testimony with the purpose of evasion in violation of the Commission's candor requirements. See *Country Broadcasting Co.*, 93 FCC 2d 83 (Rev. Bd. 1983). Given the two separate grounds for denying Valley's application found by the ALJ, it would be superfluous to also decide whether Valley also intended to misrepresent the actual facts when it filed proposed findings which were inconsistent with Chevron's letters. *See RKO General, Inc.* v. *FCC,* 670 F.2d 215 (D.C. Cir. 1981).

11. *Mann's Basic Qualifications*: Valley also maintained at the oral argument that if it is disqualified as the ALJ recommended, its competitor Mann Broadcasting Company, should also be disqualified because at the original hearing Mrs. Mann and her son were "found to have lied" even

though the ALJ "does not use the word." Tr. 2357. This point grows out of an issue which the ALJ added against Mann to determine whether she had operated her AM Station KTKR at Taft, California, unattended in violation of Section 73.93(a) of the Commission's Rules, and, if so, to determine the effect on her basic or comparative qualifications in this FM proceeding. FCC 81M-1591, May 20, 1981. Section 73.93(a), now modified and renumbered to Section 73.1860, requires in part that each broadcast station have at least one licensed operator on duty and in actual charge of the transmitter at the transmitter location or at an authorized remote control point equipped with extension meters.

12. Briefly summarized, the ALJ found in his original Initial Decision, Find. 27-41, that (a) Jerry Mann, Mrs. Mann's son, was the operator on duty on April 3, 1981, when Steven Fuss visited the station and found it allegedly unattended, the basis for adding the issue; (b) the Mann principals claim that Mrs. Mann was temporarily superintending the station operation for her son while he attended to a few errands; and (c) the latter principals further claim that Mr. Mann was outside the station building checking the temperature for a future weather broadcast and pulling some weeds during the few minutes Fuss appeared at the station. Based on the total record evidence in this proceeding, the ALJ discounted the testimony of the Mann principals and found that Mrs. Mann was not at the station during the time of the Fuss visit. I.D., Find. 17. Consequently, having found that Station KTKR had earlier been cited by the Commission for a violation of Section 73.93(a) during a November 1979 inspection, the ALJ nevertheless concluded that the two incidents of unattended operation were not sufficient for disqualification of the Mann application in this proceeding but that the incidents did demonstrate a sufficient lack of attention to warrant a moderate comparative demerit. I.D., Find. 18.

13. Valley argued in its original exceptions that Mann should have been disqualified predicated upon the ALJ's failure to accept Mann's explanation concerning the April 3 incident, which Valley characterizes as a finding that Mrs. Mann and her son lied under oath at the hearing. Valley Exceptions at 2, 3. Valley points to Commission precedent that lack of candor during a hearing requires a substantial demerit or disqualification even in the absence of a separate lack of candor issue.

14. *Discussion*: Contrary to Valley's assertion, the ALJ did not find that Mrs. Mann and her son "lied" under oath at hearing. It is clear from his Conclusion 15 with respect to the "total record evidence," and his failure to draw any adverse legal conclusions on misrepresentation against Mann, that his conclusion on the specific issues before him (whether the station was unattended in violation of Section 73.93(a)) was based on the preponderance of the evidence. Although Valley is correct that truth and candor are always at issue in Commission proceedings,

subjecting applicants to disqualification for lack of candor occurring before the eyes of the ALJ, the imposition of this severe sanction should involve lack of candor that is of "such a blatant and unacceptable dimension that its existence cannot be denied." *Adell Broadcasting Corp.,* FCC 84R-76, released October 26, 1984, para. 12, quoting *RKO General, Inc., supra,* 670 F.2d at 235. And here, the ALJ who observed the witnesses did not perceive that the testimony of the Mann principals reached this level. The cold record is simply insufficient for us to substitute our judgment for that of the very experienced presiding officer. *See Country Broadcasting Co., supra,* 93 FCC 2d at 88.

15. In sum, we have affirmed the ALJ's original finding that Mann is basically qualified, and his supplemental finding that Valley is disqualified, and we conclude that a grant of Mann's application will serve the public interest.

16. ACCORDINGLY, IT IS ORDERED, That the application of Valley FM Radio (File No. BPH-790308AH) IS DENIED; the application of Mann Broadcasting Co. (File No. BPH-790730AA) IS GRANTED, and Mann's motion to strike supplemental exceptions, filed July 15, 1984 IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 84D-34

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Valley FM Radio Taft, California	BC Docket No. 80-379 File No. BPH790308AH
Louise E. Mann t/a Mann Broadcasting Co. Taft, California	BC Docket No. 80-380 File No. BPH790730AA
For Construction Permit for a New FM Station	

Appearances

David Tillotson and *Marilyn Sonn* on behalf of Valley FM Radio and *Morton L. Berfield* on behalf of Mann Broadcasting Co.

SUPPLEMENTAL INITIAL DECISION
OF
ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

Issued: May 21, 1984; Released: May 25, 1984

Preliminary Statement

1. By *Memorandum Opinion and Order* (*MO&O*), released May 2, 1983 (FCC 83R-32), the Review Board remanded this proceeding for further hearing upon the following issues:

(1) To determine whether Valley FM Radio has reasonable assurance of the availability of its proposed transmitter site, and in light thereof, whether Valley possesses the basic qualifications to be a Commission licensee.

(2) To determine whether Valley FM Radio has violated Rule 1.65 by failing to notify the Commission of the unavailability of its transmitter site, and if so, to determine in light of the previous Rule 1.65 issue specified against Valley, the effect on the applicant's basic or comparative qualifications.

(3) To determine whether Valley FM Radio was lacking in candor or misrepresented facts or information regarding the availability of Valley's proposed transmitter site, and if so, to determine the effect thereof upon the applicant's basic or comparative qualifications.

2. On August 4, 1983, Valley FM Radio (Valley) filed a Petition to Amend its Application. The tendered amendment modified Valley's application in two respects. First, the amendment designated a new transmitter site.[1] Second, it reported changes in the Valley financial proposal. By *Memorandum Opinion and Order*, released August 19, 1983 (FCC 83M-2786), the Valley Petition to Amend was granted which, among other things, changed the antenna site, and the amendment was accepted.

3. In light of the fact that a financial issue was designated against Valley in the original hearing, and its August 19th amendment modified its financial proposal, the Presiding Judge found it desirable to update the hearing record based on Valley's present financial proposal and to determine whether the changes adversely affected its financial qualifications. Accordingly, the Presiding Judge enlarged the issues by *Order*, released August 29, 1983 (FCC 83M2905) as follows:

> To determine the nature of the changes in Valley's financial proposal as reflected in Valley's August 19, 1983 amendment to its application and whether such changes will adversely impact on Valley's financial qualifications to construct and operate the proposed station.

4. Hearings on these issues were held in Washington, D.C. on August 23-24, 1983 and Proposed Findings and Conclusions and Reply Findings and Conclusions were filed respectively on November 14 and December 19, 1983.

Findings of Fact

Site Availability Issue (Issue 1)

5. Some background information is necessary in dealing with this issue. Mr. Steven Fuss (Fuss) is the 100% owner of Valley and is the sole officer and sole director (Valley Exhibit 1).[2] From the time the Valley application was filed - March 9, 1979 - until a new antenna site was specified by amendment accepted by *Order*, released August 19, 1983, Valley has throughout this period of time specified the same antenna site. For descriptive purposes, this site will be called the Aitken-Chevron site since the Land is owned by Chevron USA, Inc. (Chevron) and Mr. Aitken of Aitken Communications now leases this land from Chevron for his two-way radio facilities. Valley (Fuss) originally proposed to mount its antenna on the Aitken tower and place the transmitter in an existing shed at the base of the tower. The address for this property is 25 Hill Road near Taft, California (Mann Exhibit 1, pp. 1-4).

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[1] On July 25, 1983, Valley's counsel filed a notice that it had lost its antenna site and would amend its application shortly to specify a new site.

[2] This is an exhibit number from the first proceeding. All exhibits introduced in the remand proceeding will be preceded by an R.

6. The first time Valley admitted it did not have the Aitken-Chevron site was on July 25, 1983 when counsel filed a so-called Section 1.65 Notice for Valley (Mann Exhibit R-2). Whether Valley or Fuss knew or should have known about the loss of antenna site before July 25, 1983 will be considered *infra* under Issues 2 and 3.

Valley's New Antenna Site

7. Valley's new antenna site as permitted by *Order* released August 19, 1983 is on land owned by Chaparral Petroleum, Inc. (Chaparral). Submitted with the Valley amendment to the new site was a letter from Chaparral dated July 27, 1983 in which Chaparral acknowledges its intention to enter into a lease with Valley subject to our acceptance and conditions (Valley Exhibit R-1, p. 31). Accordingly, it may be concluded that whatever agreement or lack of agreement that existed with the Valley original site, it now has the reasonable assurance of the site now specified.

Section 1.65, Lack of Candor, Misrepresentation

8. Valley's application was filed March 8, 1979, specifying as its transmitter site land owned by Chevron on 25 Hill Road near Taft, California which land was leased to Aitken. Aitken used the leased land as a transmitter and antenna tower for his two-way radio communication facilities. At the initial hearings in this proceeding conducted February 10-13, 1981, there were two special issues directed toward Valley. The first was a broad-based financial issue which specifically inquired into the full costs of construction and operation of the Valley proposed station. The second issue required a determination as to whether Valley had violated Commission Rule 1.65 by failing to report financial and integration changes.

9. During the February, 1981 hearings there was extensive testimony by Fuss regarding Valley's transmitter site arrangements since such matters were pertinent to resolution of the broad financial issue. In that context, Fuss testified that Aitken, who operates Aitken Communications, Inc., was willing to sublease to Valley, upon terms and conditions to be agreed upon, provided Chevron gave its prior approval (Mann Exhibit 1, p. 4). Fuss, on February 11, 1981, testified that Aitken was in the process of getting a basic lease from Chevron and did not want to enter into a written commitment with Valley for a sublease when Aitken did not itself have a written lease (Tr. 434-435). Fuss further testified that he had directly approached Chevron for a lease for Valley on the land adjacent to the Aitken site and that "there is no problem as far as the deferment of the payment". Mr. Fuss testified that Valley had furnished Mr. Ray Hicks of Chevron site maps and other technical data, and Fuss had several

telephone conversations with Mr. Hicks, and that he (Fuss) also had discussions with Messrs. Jensen and Rabey of Chevron and that

> ". . my basic understanding is that Chevron USA, will, upon approval of their other operating departments, grant Valley a lease on the terms that we basically discussed, roughly $100 a month with deferment of payment". (Tr. 439)

10. Following the February, 1981 hearing, several additional issues were added, none of which address the question of Valley's antenna site, but did include a reporting, lack of candor and misrepresentation issue against Valley regarding remote control and monitoring services. Further hearings were held on the added issues on December 7-11, 1981 and Proposed Findings of Fact and Conclusions of Law were filed by Valley on the issues litigated in both February and December, 1981, on June 25, 1982. On pages 13-14 of Valley's Proposed Findings of Fact, the following was stated (Mann Exhibit R-3, pp. 1-3):

> "(h) *Transmitter Site Rent*: None. - Ken Aitken has agreed to lease Valley space for its antenna on a 100 foot tower that Mr. Aitken plans to erect and also to lease Valley transmitter space in an adjacent building for a total amount of $150.00 per month. Mr. Aitken has also agreed to permit Valley to defer payment of the rent for the tower and transmitter space until six months after Valley's station commences operation (Valley Ex. 3, Mann Ex. 1, Tr. 227-255, 432-436). Valley's proposed antenna/transmitter site is located on land owned by Chevron Oil Company which is leased to Mr. Aitken and used by him as an antenna/transmitter site for two way radio. A 50 foot tower and transmitter building are currently located on the site.[22] (Tr. 432-436)
>
> ---
>
> [22] If Aitken for any reason fails to carry out his agreement to provide Valley with tower and transmitter space on the terms indicated, Valley can lease the site directly from Chevron Oil Company for $100 per month. However, if Valley were to lease directly from Chevron it would have to construct its own tower and transmitter building and this would increase Valley's overall construction costs by approximately $3,050 (Tr. 436-440, Valley Ex. 8).

11. The original *Initial Decision* (FCC 82D-82, released January 3, 1983, paragraph 13, including footnote 3 of the Findings of Fact accepted Valley's representations stating:

> "13. The transmitter site rent which includes space on a tower is stated by Valley to be $150 per month which payments will be deferred until after Valley has been in operation for six months (Valley Exhibit 3, Mann Exhibit 1; Tr. 227-55, 432-36).[3]
>
> [3] The transmitter and tower site lease is from a Mr. Aitken who in turn leases the site from the Chevron Oil Company. At the present time, Mr. Aitken is operating a two-way radio facility on the site. Should Aitken, for any reason, fail to carry out his commitment to Valley, Valley can lease from Chevron at $100 per month and it would cost approximately $3,050 for Valley to construct its own facilities (Tr. 436-40; Valley Exhibit 8)."

12. During the course of the remand proceeding, additional facts came to light concerning Valley's proposed use of Chevron land, either on the

Aitken site or on adjacent Chevron land. Valley admitted that it never had any written statement or agreement nor any oral agreement or understanding with Chevron authorizing Valley to locate its proposed facilities on the Aitken site or any other land owned by Chevron (Mann Exhibit R-1; Tr. 1972-1973).

13. Steven Fuss first contacted Chevron in January, 1980, speaking to Mr. Ray Hicks by telephone and then writing to Mr. Hicks on January 15, 1980. Fuss requested a land use lease directly from Chevron and described the proposed site as "at the crest of 25 Hill, adjacent to the site of Aitken Communications facility". Fuss gave as the geographical coordinates (35-06-58, 119-28-12) the same coordinates specified in Valley's application for the Aitken site. Fuss indicated that:

> ". . . Valley FM Radio because of its upcoming FCC hearing needs some form of letter from Chevron indicating that it is pursuing the necessary steps in granting such a lease, and that based upon "its preliminary processing Valley should be granted a lease option in the near future.' " (Mann Exhibit R-4, pp. 11-13).

Fuss then had no further contact with Chevron until about one year later in late January or early February, 1981 (Tr. 2051-2052). At that time, Fuss had a conversation with Mr. N. R. Jensen of Chevron. Mr. Jensen then wrote Fuss on February 3, 1981 stating:

> "Pursuant to our recent conversation this will confirm that Chevron has received your request for a lease in subject section for a tower site. We are presently requesting the approval of our Operating Departments, which we expect will take several weeks after which time we will be able to advise you with more certainty whether or not we will grant your request.
>
> Although our preliminary investigation indicates there is a possibility we will grant this lease, until we obtain field clearance and management has signed the agreement we cannot guarantee you a lease. We will, however, keep you advised of our progress." (Mann R-4, p. 15).

Between February 3, 1981 - the date of Mr. Jensen's letter - and December, 1981 or January, 1982, Fuss had no contact with Chevron (Tr. 2052). On February 8, 1983, Fuss wrote to Mr. Jensen stating:

> "Valley FM Radio would like to sublease facilities for its proposed FM station at Taft, California from your leaseholder, Mr. Ken Aitken/Aitken Communications, Inc. Mr. Aitken informs us that your approval of the site is necessary before he can proceed with the lease to us, therefore I am submitting the technical data that you may need and this request for approval.
>
> Please inform both Mr. Aitken and ourselves of your decision so that we may formalize our agreements." (Mann R-4, p. 17)

On February 22, 1982, Mr. T. W. Rabey of Chevron responded, indicating that Chevron's agreement with Aitken contained "some very restrictive terms and conditions pertaining to interference", that Valley would be required to agree to the restrictions in the Aitken agreement and that:

> "As soon as we have updated our field approvals and have contacted Mr. Ken Aitken for more detail on your operation and its compatibility with the agreement he has, either Mr. Jensen or I will contact you concerning your proposal". (Mann R-4, p. 19)

14. Valley's proposal to locate its FM facilities at the Aitken site were then reviewed by Chevron's operating departments. As a result of this review, Mr. Rabey wrote Valley on March 19, 1982 stating:

> "Concerning your recent proposal to construct a commercial FM broadcast station on Section 26, we regret to inform you that Chevron does not want to enter into a ground lease for that purpose at this time. Further, establishing your station under the license agreement for the Aitken communications site would not be feasible. We appreciate your expressing your interest." (Mann R-4, pp. 2, 21)

Upon receipt of this letter from Rabey, Fuss telephoned Mr. Rabey and inquired why Chevron had concluded that the proposed use of the Aitken site was not feasible. Mr. Rabey indicated Chevron's concerns with possible interference to Chevron's own telecommunications facilities at the site and Chevron's concern that it might have difficulty in enforcing its rights under the licensing agreement with Aitken. Such rights would require the immediate suspension of operations that interfered with Chevron's facilities and permit Chevron to cancel the lease and take repossession of the site. This raised some question for Chevron since, in Valley's case, it would result in terminating an operating broadcast station licensed by the FCC. Fuss responded that he did not believe Chevron should be concerned about interference to its facilities and that Fuss did not believe there would be any impediment to Chevron's enforcing its rights against Valley's sublease of the antenna-transmitter site. Mr. Rabey listened to Fuss without comment and without encouraging or discouraging him. Mr. Fuss did not ask Mr. Rabey whether his explanation resolved Chevron's problem nor did Mr. Fuss request Mr. Rabey to modify or withdraw the March 19, 1982 letter nor issue another letter nor take any action. On March 22, 1982, Mr. Fuss wrote to Rabey confirming their telephone conversation. Mr. Fuss' letter does not request Chevron to take any action and concludes:

> "We remain most flexible and open to your suggestions or your requirements, I would be happy to meet with your communications people to answer any questions they might have about our proposed operations." (Mann R-4, pp. 3, 4, 23; Tr. 2022-2023, 2031, 2070)

15. There was no response to the Fuss March 22, 1982 letter and Fuss did not follow up in any way with Chevron (Tr. 2026-2027). Nor did Chevron give any further consideration to Valley's proposal. Fuss admitted that the Chevron letter was important as evidenced by the fact that upon its receipt, Fuss immediately telephoned Mr. Rabey, but Fuss did not send the letter to his communications counsel. Nor did Fuss inform his counsel of the Chevron letter even though they had at least eight telephone conversations in the next three months. Fuss did not discuss the

Chevron letter with Mr. Aitken. Mr. Fuss did not report the Chevron letter in any fashion to the Commission even though Fuss had been through two rounds of hearings on failure to report, lack of candor and misrepresentation issues. Fuss was aware of the Commission's reporting requirements, was involved in several applications before the Commission, and had at one point in this proceeding, represented himself (Tr. 2027-2031, 2053, 2060-2062, 2072, 2274-2275, 2316-2319, Mann Exhibit R-4, p. 6).

16. In January, 1983, Louise Mann, the competing applicant, inquired of Mr. Rabey if Chevron had given Valley permission to locate an FM broadcast station on Chevron property. Mr. Rabey's response was that while Chevron had considered the possibility, Chevron had decided against it, stating:

> "The decision was that Chevron should not enter into a ground lease or license for that purpose. Further, establishing an FM radio station on the Aitken communications site under the Aitken Communications license agreement was considered unfeasible and not in the best interest of Chevron U.S.A. Inc. The Aitken Communication operation is not a commercial broadcast station. It serves two-way radio units.
>
> Chevron is not at this time considering any addition of radio facilities of others on Section 26."

It was the above-quoted letter and the subsequent disclosure on March 19, 1982 of the Chevron decision that led to the Mann petition, which was granted by the Review Board, resulting in this remand proceeding.

17. Following the filing of the Mann petition in February, 1983, Fuss and his communications counsel, Mr. David Tillotson, had several communications with Mr. Rabey. Valley sought to have Chevron reconsider its prior determination. On June 30, 1983, Mr. Rabey wrote Valley as follows:

> "Our letter to you of June 24, 1983, was returned. So that there can be no misunderstanding whatever concerning telephone conversations from June 24 to the date hereof, you are again advised as follows:
>
> Your request for the subject site has been reviewed again. Chevron does not want to give you a sublease, license or ground lease on Section 26." (Mann R-4, pp. 4-9, 26, 28, 33)

It is Valley's position that its knowledge of the loss of the Aitken-Chevron antenna site should date from June, 1983 and not March 19, 1982 when Mr. Rabey wrote Fuss stating that use of the Aitken-Chevron site would not be feasible.

The Financial Issue

18. The original Initial Decision concluded at paragraph 1 through 3 inclusive of the conclusions that Valley is financially qualified to construct and operate as then proposed. The sole purpose of the present further consideration of the financial issue is the amendment accepted by the Presiding Judge on August 19, 1983 which changed Valley's proposal to reflect the costs associated with the new antenna site and other matters.

The August 19, 1983 amendment notified the Commission that Arthur James had assigned his option to purchase 49% of Fuss' stock in Valley to Lowell Patton, Chuck Bowman, Robert Cohen and Ted Gardner, jointly (Valley Exhibit R-1, p. 1). That assignment of option resulted in a change in the source of funds available to Valley to construct and operate its proposed FM station. Mr. Patton had obtained letters from First Pacific Bank of Santa Monica, California establishing its willingness to lend Valley $100,000 to cover its construction and operating expenses (Valley Exhibit R-1, pp. 11-12). The proceeds of this loan will be used only for construction and operating expenses of the proposed Taft station.[3] (Tr. 2179) First Pacific Bank is willing to make this loan solely on the basis of the financial ability of its long-time customer, Lowell Patton, and his willingness to collateralize the loan (Valley Exhibit R-1, pp. 11-12). Mr. Patton has confirmed that he will provide any collateral that may be required to secure the loan (Valley Exhibit R-1, f. 13).

19. The August 19, 1983 Valley amendment also updated Valley's application to reflect increased expenses that Valley will incur as a result of its substitution of the Chaparral transmitter site for the original Chevron-Aitken antenna site. Originally, Mr. Fuss had some type of an agreement, subject to approval by Chevron, that Aitken would defer payment of rent by Valley to Aitken for the antenna tower space and use of an existing building until six months after Valley's station commenced operation (Tr. 227-55, 432-436). Chaparral, however, will not agree to defer rent. Accordingly, Valley has now budgeted $1,250 for pre-operating and first-quarter transmitter site rental in its financial proposal (Valley Exhibit R-1, p. 8; Tr. 2047). Valley also added about $4,000 to its estimated construction costs to cover its cost of constructing an antenna tower and housing for its transmitter at the Chaparral site (Valley Exhibit R-1, p. 4; Tr. 2232-2233).

20. In addition to the increase in costs of $5,250 ($4,000 plus $1,250) mentioned *supra*, Valley has also added $1,350 to cover the cost of remote control service, increased its estimates of public utility costs and other costs, such as legal, to reflect its current plans (Valley Exhibit R-1, pp. 4, 8).

21. As a result of these changes, Valley's new estimated construction costs are $32,275 and its first-quarter operating expenses total $13,265 or a total requirement of $45,540 (Valley Exhibit R-1, p. 4). The $100,000 loan will cover such expenses and permit a margin of more than $50,000 to cover unanticipated expenses.

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[3] The record shows Mr. Fuss is involved in other broadcast facilities which have financial requirements.

Comparative Coverage

22. While there is no specific issue in the remand proceeding on the comparative coverage issue, it is desirable that the original Findings of Fact in the Initial Decision at paragraph 75 and the Conclusions at paragraph 30 be revised to reflect the changed conditions occasioned by Valley's new antenna site. The following table will demonstrate the differences:

Valley (Aitken Site)	*Valley (Chaparral Site)*	*Mann*
	Population within the 1 mV/m service area	
66,101	46,061	16,251
	Fourth Primary Nighttime Service	
109.5 sq. mi. 346 persons	113.3 sq. mi. 359 persons	—
	Fifth Primary Nighttime Service	
69 sq. mi. 518 persons	56.6 sq. mi. 179 persons	—

(Valley Exhibit 7 and Valley Exhibit R-4, Table 2)
On the basis of the original comparative coverage showing, Valley was awarded a significant preference. While the revised numbers for the Valley Chaparral site show some reduction in areas and populations served by Valley and not Mann, the areas and populations are still significant and no reduction in the preference on this part of the comparative coverage issue is warranted.

Conclusions of Law

Remand Issue 1

1. Pursuant to the Valley application, as amended by *Order* released August 29, 1983, Valley has now demonstrated that it has the reasonable assurance of a transmitter-antenna site on the property of Chaparral Petroleum, Inc. Accordingly, Issue 1 is resolved favorable to Valley. It is clear, however, that the Valley amendment to a new site does not resolve remand issues 2 and 3. Further, if Valley had not amended to the new antenna site and the site issue had been resolved on the basis of the original Chevron-Aitken site, it would have been adverse to Valley. The original site proposed by Valley was never in fact available to it as Chevron had never given its approval for Valley to use either the Aitken-Chevron land, or any other Chevron property.

Remand Issues 2 and 3

2. Both of these issues will be considered together since the same sequence of events is common to both issues. The facts developed in the remand proceeding show that there were three major incidents of possible

Valley misconduct. First, Fuss, the 100% stockholder of Valley, testified in the original hearing on February 11, 1981 that Chevron was "most likely" to grant a lease to Valley and that it was Fuss' basic understanding that 'Chevron USA will, upon approval of their other operating departments, grant Valley a lease . . ." This testimony of Fuss could lead to only one conclusion, i.e., Chevron was on the verge of granting Valley a lease. In truth, Chevron had written Fuss on February 3, 1981, less than 10 days prior to this testimony, that there was only a "possibility" of a lease and that it would be several weeks before Fuss would be advised" . . . with more certainty whether or not we will grant your request". The reality of the Chevron letter was thus markedly different from the Fuss testimony. Chevron says nothing in its letter indicating that Chevron would "most likely" grant a lease to Valley. Fuss colored his testimony in a misleading way.

3. The second, and most serious, incidence of Valley misconduct derives from Fuss'[4] failure to report Chevron's March 19, 1982 letter formally denying Valley use of either the Aitken site or a site on adjacent Chevron land. As stated by the Review Board in the remand order (paragraph 5):

> "A Section 1.65 reporting issue is also warranted here since it appears that Fuss must have realized in March 1982 that the Chevron site was unavailable to Valley, and this important fact should have been timely reported to the Commission. See *Midwest St. Louis, Inc.*, 61 FCC 2d 203, 206-07 38 RR 2d 569, 573-74 (Rev. Bd. 1976) Section 1.65, 47 CFR §1.65, requires an applicant to report changes which may be of a decisional nature. The apparent loss of a transmitter site is obviously of decisional significance."

The hearing record on remand reenforces the Review Board's analysis. The March 9, 1982 Chevron letter was plainly a denial of Fuss' alternative requests for a direct lease from Chevron or Chevron's permission for Valley to sublease from Aitken. Fuss recognized the importance of the letter by immediately telephoning Chevron and speaking to Mr. Rabey, the Chevron representative handling this matter. Rabey did not encourage or discourage Fuss but only listened. Fuss did then write Chevron a self-serving letter confirming the conversation, but Fuss did not request Chevron to reconsider the matter, or ask that Chevron take any action. For Chevron's part, Mr. Rabey regarded the matter as closed and Mr. Rabey gave the Fuss proposal no further consideration. In fact, Fuss himself made no further contact with Chevron on his request until the Mann petition was filed almost one year later, in February, 1983.

4. Fuss knew the Commission's reporting requirements. Fuss must also be charged with knowledge of the adverse affect of the application if

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[4] This failure relates solely to Fuss since neither the Commission nor his communications counsel were told about this letter.

the March, 1982 letter from Chevron was disclosed. He immediately called Chevron upon receipt of the letter but fails to ask Chevron the critical question, i.e., Will you (Chevron) reconsider and grant the antenna site lease as requested? Rather, he attempts to elevate his telephone call with the Chevron official to a self-serving statement based upon his (Fuss') impression. Fuss also did not tell his communications attorney of the March, 1982 Chevron letter. No doubt Fuss chose to take a gamble and ride out the storm and avoid the difficult questions which could arise as to his site and the prior testimony. Further, the failure to advise his attorney gives added recognition on Fuss' part that the failure to report was a serious matter, and, that the attorney would have demanded that Fuss promptly disclosed the matter in March, 1982 and thus create complications Fuss had unilaterally decided to avoid. Mr. Fuss gave every impression as a witness of being an articulate, well-educated person. He knew that Chevron was one of the largest corporations in the world. He knew from past experience with Chevron that any corporate decision was based upon the views of the various interested departments at Chevron. Thus, Mr. Fuss' claim that he believed his telephone call to Mr. Rabey after receipt of the March 19, 1982 letter somehow revived his Chevron-Aitken site lease negotiations cannot be accepted. The facts are that Mr. Rabey for Chevron considered that Chevron had given its final decision on March 19, 1982 that the land lease request was denied. Mr. Fuss also must be held responsible for knowledge that his lease request from Chevron was denied by the letter of March 19, 1982. Any other conclusion would be contrary to the facts of record. Thus, Mr. Fuss must be charged with a gross violation of Section 1.65 of the Rules in a situation where he had every motivation to deliberately conceal an important fact which he knew either had to be corrected or hope that he could somehow get through the hearing process without the matter ever coming to light.

5. The third instance of Valley misconduct occurred when Valley's Proposed Findings of Fact and Conclusions of Law were filed on June 25, 1983 continued to represent the availability to Valley of the Aitken-Chevron site. Fuss did not confide in his attorney and thus the findings tracked the hearing record, including Mr. Fuss' previous misleading testimony. Valley (Fuss) is responsible for the findings filed on its behalf and in fact Mr. Fuss actually placed in motion a situation which permitted counsel to unknowingly urge findings which were not consistent with the facts.

6. In the original Initial Decision (paragraphs 5-7 of the Conclusions) Valley was found to have violated Section 1.65 with regard to financial reporting. A comparative demerit was there assessed since it was not then established that Fuss had any motive to conceal or deceive. It is now clear that with respect to the Fuss site testimony and his continued silence

thereafter, he has both concealed and deceived his own attorney on a continuing basis and the Commission.

7. The Section 1.65 violation as now developed in this record warrants disqualification of Valley. Fuss' concealment has led to the continuing misrepresentation, implicit and explicit, by Valley as to the availability of its antenna site. The cumulative impact of Valley's misconduct requires Valley's disqualification.

8. With the Valley disqualification, it is not necessary to further review Valley's financial qualifications or the comparative preference awarded to Valley in the first Initial Decision for service to a greater area and population. However, a conclusion can be made that the Valley amendment approved by *Order* released August 19, 1983 (FCC 83M-2786)[5] did not result in any adverse change in Valley's financial qualifications and Valley is still found to be financially qualified to construct and operate as now proposed at the new antenna site. Likewise, the comparative preference awarded Valley for its superior coverage in terms of area and population, while slightly diminished from the first Initial Decision, still rates a significant preference for Valley.

9. Based on the evidence of record on the issues as added by the Review Board in its Memorandum Opinion and Order released May 2, 1983, Issue 1 is resolved favorable to Valley in that it *now* has an antenna site.[6] Issues 2 and 3 are resolved against Valley and Valley's violation of Section 1.65 of the Rules is found, based on the facts of record on Issues 2 and 3 to be disqualifying.

10. Accordingly, IT IS ORDERED, that unless an appeal is taken from this Supplemental Initial Decision, or the Commission reviews it on its own motion, the application of Valley (File No. BPH-790308AA) IS DENIED.[7]

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[5] The amendment of Valley was accepted on a contingent basis and solely for the purposes of that ruling it was conditionally found that Valley first knew of the rejection of its antenna site on June 30, 1983. All parties and the Presiding Judge recognized that the actual time Valley knew of the rejection of its antenna site was at the time of the Memorandum Opinion and Order a matter to be litigated under the Review Board's Remand Order.

[6] But for the Valley amendment to the new site, Valley would have been found not to have reasonable assurance of the availability of the original Aitken-Chevron antenna site or any adjacent Chevron antenna site.

[7] Under Rule 1.276, appeals (in the form of exceptions to the Supplemental Initial Decision) must be filed within thirty (30) days of the public release of the full text hereof, unless an extension of time is granted. In the event no exceptions are filed and the Commission has not undertaken to review the Supplemental Initial Decision during the prescribed 50-day period or taken any of the actions specified in paragraph (c) of Rule 1.276, the Supplemental Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

FEDERAL COMMUNICATIONS COMMISSION
BYRON E. HARRISON, *Administrative Law Judge*

Amateur Radio Service
Morse Code

Amateur licensee was found to have cheated on Morse code examination. Therefore, his station license was revoked, his operator license suspended, and his application for a higher class license denied. —*Vincent J. Beard*
PR Docket No. 83-1065

FCC 84R-80

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of

Vincent J. Beard
2 Soundview Drive, Apt. D
White Plains, New York 10606

PR Docket
No. 83-1065
PR-2708-S

Licensee of Station N2EDW in the Amateur Radio Service

Suspension of License of

Vincent J. Beard
2 Soundview Drive, Apt. D
White Plains, New York 10606

PR Docket
No. 83-1066

For Technician Class Amateur Radio Operator License

Application of

Vincent J. Beard
2 Soundview Drive, Apt. D
White Plains, New York 10606

PR Docket
No. 83-1067

For General Class Operator License

Appearances

Arthur V. Belendiuk, for Vincent J. Beard; *Carol Fox Foelak*, for Chief, Private Radio Bureau, Federal Communications Commission.

DECISION

Adopted November 2, 1984; Released: November 6, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. An amateur radio operator, Vincent J. Beard, seeks review of an Initial Decision, FCC 84D-27, May 7, 1984, which concluded that he had cheated during an amateur license examination. After a trial-type hearing in New York City, Chief Administrative Law Judge Fitzpatrick found that largely undisputed documentary and oral evidence established that during an examination to secure a higher class license Beard was observed looking at unauthorized material consisting of answers to the Morse Code test in violation of 47 CFR 97.129. ("No licensed radio operator. . .shall obtain or attempt to obtain. . .an operator license by fraudulent means.") Based on its review of the record, in the light of the written arguments of Beard's counsel, the Review Board affirms the revocation of Beard's station license, suspension of his operator license, and denial of his application for a higher class license.

2. At the hearing Beard did not dispute that he had unauthorized material in his possession during the Morse Code examination on March 23, 1983, and that during the examination he was looking at that material, a small card. Bureau Ex. 5; Tr. 77-80, 106-107; ID Find. 13-16, 22-23. That small card, a crib sheet, contained information which enabled its user to pass all eleven versions of the thirteen word per minute Morse Code exam. Tr. 37, 81, Bureau Ex. 6, ID Find. 14-16. An FCC Applications Examiner who was administering the exam, observed Beard looking into his cupped left hand which contained the card. Tr. 77, 107-108; ID Find. 13-16. Beard, who is right handed, Tr. 119, acknowledged that he had the card in his hand during the examination and that after listening to the taped portion of the Morse Code test he was confronted by the Application Examiner and handed her the card. Tr. 106-108, ID Find. 13-16. Beard also admitted that he had "a suspicious nature because I was looking into my hand" and that the Examiner "did exactly what she was supposed to do". Tr. 129-130, ID Find. 23.

3. The Chief ALJ who had an opportunity to observe Beard's demeanor found his explanation inherently incredible, ID Conclusions 2. In essence, Beard claimed that immediately before he entered the examination room he was handed a small card by a man named Bruce, whom he had met while waiting to take the test. And later during the examination he was merely looking at the card to determine what it was. ID. Finds. 17-24.

4. *Discussion*: Beard's brief advances two main arguments. First, it claims that the Bureau failed to prove its case by clear and convincing evidence as required by *Sea Island Broadcasting Co.* v. *FCC*, 627 F.2d 240, 244 (D.C. Cir. 1980). Br. 11. But the Bureau correctly responds that *Sea Island* specifically stated that the clear and convincing standard is not applicable to all revocation cases before the FCC. Significantly, Judge Leventhal speaking for the Court indicated that the higher standard need not be applied to "the case of Amateur Band (HAM)" licensees like Beard. 627 F.2d at 244. Thus, the Bureau is correct as a matter of law. And our review of the factual record has convinced us that the Bureau has produced clear substantial evidence which gives rise to a high degree of certitude so that we are left without any real or reasonable doubts about the findings and conclusions of the Chief ALJ, who also had the opportunity to observe the witnesses. Compare *Alan K. Levin*, FCC 84R-18, 55 RR 2d 981, 982 para. 10. (Rev. Bd. 1984); *Gilmore Broadcasting Corp.*, 95 FCC 2d 289, 293, and 301 note 1 (Rev. Bd. 1983).

5. Second, in capital letters at the top of Beard's examination paper was the warning that any attempt to obtain an Amateur license by fraudulent means or by copying or divulging questions used in the examination would constitute a violation of the FCC rules, for which penalties are provided. Tr. 136, ID Find. 24, note 10. Nevertheless, Beard now argues that the Bureau should be estopped from proceeding to revoke his license because if he had been warned about the potential license revocation by the Applications Examiner he would have attempted that same day to locate "Bruce" who would have corroborated his story. Br. 15-19. The Bureau responds that Beard's attempt to invoke the doctrine of lack of notice and *res judicata* is legally flawed. Reply 8-9. The Bureau has the better of the legal argument on this point; moreover, in conducting our own review of the record, unlike the Chief ALJ, we have assumed *arguendo* that Bruce would have corroborated Beard's story about what happened outside the examination room. The crucial question in this case concerns what happened later in the examination room. On that key point the documentary evidence and Beard's own testimony corroborate the eyewitness testimony of the Examiner that Beard was looking at the crib sheet in his cupped left hand after the examination had commenced. The totality of that evidence leaves us without any doubts about the ALJ's conclusion that Beard wilfully violated the prohibition against obtaining or attempting to obtain "an operator license by fraudulent means." 47 CFR 97.129.

6. ACCORDINGLY, IT IS ORDERED, That

(1) The license of Vincent J. Beard for Station N2EDW in the Amateur Radio Service IS REVOKED;

(2) The Technical Class Amateur Radio Operator License of Vincent J. Beard IS SUSPENDED FOR TERM;

(3) The application of Vincent J. Beard for General Class Operator License IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 84D-27

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of	
Vincent J. Beard 2 Soundview Drive, Apt. D White Plains, New York 10606	PR Docket No. 83-1065 PR-2708-S
Licensee of Station N2EDW in the Amateur Radio Service	
Suspension of License of	
Vincent J. Beard 2 Soundview Drive, Apt. D White Plains, New York 10606	PR Docket No. 83-1066
For Technician Class Amateur Radio Operator License	
Application of	
Vincent J. Beard 2 Soundview Drive, Apt. D White Plains, New York 10606	PR Docket No. 83-1067
For General Class Operator License	

Appearances

Vincent J. Beard, pro se; Carol Fox Foelak on behalf of Chief, Private Radio Bureau, Federal Communications Commission.

INITIAL DECISION
OF
ACTING CHIEF ADMINISTRATIVE LAW JUDGE THOMAS B. FITZPATRICK

Issued: May 2, 1984; Released: May 7, 1984

Preliminary Statement

1. Vincent J. Beard is the licensee of Amateur Radio Station N2EDW and holds a Technician Class Amateur Radio Operator license. His current licenses were granted February 25, 1983, for a five year term.

2. On September 9, 1983, the Chief, Private Radio Bureau, pursuant to delegated authority, issued an *Order to Show Cause and Suspension Order (Order).* Vincent J. Beard was ordered to show cause why his license for Station N2EDW should not be revoked. His Technician Class Amateur Radio Operator license was suspended.[1] The *Order* alleged that on March 23, 1983, while Beard was taking an Amateur license examination, a Commission examiner observed him looking at unauthorized material, which consisted of answers to be used to answer the questions in the Morse Code test.

3. On October 17, 1983, the Chief, Private Radio Bureau, pursuant to delegated authority, issued a *Further Order*[2] designating for hearing Vincent J. Beard's application, filed April 27, 1983, to upgrade his operator privileges from Technician to General class. The *Further Order* consolidated the application proceeding with the revocation and suspension proceeding.[3]

4. The *Further Order* specified the following issues in the consolidated proceeding:

> (a) To determine whether [Beard] wilfully violated Section 97.129 (obtaining or attempting to obtain license through fraud) of the Commission's Rules on March 23, 1983.[4]
>
> (b) To determine whether [Beard is] qualified to remain an Amateur Radio station licensee.
>
> (c) To determine whether [Beard's] license for Amateur Radio Station N2EDW should be revoked.
>
> (d) To determine whether the suspension of [Beard's] Amateur Radio Operator license should be granted.

5. The prehearing conference and hearing were held on January 4, 1984 in New York, New York. Beard appeared in his own behalf.

6. By *Order* (FCC 84M-344), released January 23, 1984, the Presiding Judge received in evidence Bureau Exhibit 5 and placed under seal, not available to the public, Bureau Exhibits 4 and 5. The record was closed by *Order* (FCC 84M-453), released January 27, 1984. The Private Radio

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[1] Beard was informed that the suspension would be held in abeyance (until this case is decided) if, within 30 days of receipt of the *Order*, he requested a hearing or submitted a written statement concerning the suspension matter. Since Beard timely requested a hearing, the suspension has been held in abeyance pending the outcome of this proceeding.

[2] The *Further Order* was published in the Federal Register on October 25, 1983, 48 Fed. Reg. 49373.

[3] By Reply, dated September 15, 1983, Beard notified the Commission that he would appear and present evidence relative to the revocation and suspension proceedings.

[4] Section 97.129 states: "No licensed radio operator or other person shall obtain or attempt to obtain, or assist another to obtain or attempt to obtain, an operator license by fraudulent means."

Bureau filed "Proposed Findings of Fact and Conclusions of Law" on February 29, 1984.[5]

Findings of Fact

A. Administration of Examinations To Amateur Operator Applicants

7. The Commission licenses Amateur operators under Part 97 of its Rules. The procedures for the qualifying examinations are specified in Sections 97.19 - 97.33 of the Rules. The examinations are administered to Amateur applicants to qualify those who pass for one of five Amateur Radio operator licenses, which are, in ascending order of privileges: Novice, Technician, General, Advanced and Amateur Extra. The examinations consist of various "elements," which are Morse Code speed tests (code tests) at 5 words per minute (wpm), 13 wpm and 20 wpm and written tests of rules and theory of varying levels of difficulty. (Bureau Ex. 6, pp. 1-2)

8. The examinations are given periodically at the Commission's New York City office, under the supervision of Alexander Zimny, the Engineer-In-Charge of the New York office, by Applications Examiner Debra Thomas. When the examinations are given at that office, the code tests are administered to groups of applicants (e.g., 20 wpm at 9:00 a.m., 13 wpm at 10:00 a.m., and 5 wpm at 12:00 Noon). Where a class of license applied for requires both a code element and a written element, the applicant takes the code element first. The code tests are corrected immediately, and the applicants who have taken the 20 wpm test know whether they have passed or failed before the 13 wpm test is given. (TR 66) The code tests are administered by testing the applicant's comprehension of a tape recording containing a code message sent at the speed being tested. (Bureau Ex. 6, pp. 2-3)

9. To take a test, the applicant fills out an Amateur application (FCC Form 610) and Amateur Record Card (FCC Form 763) and hands them to the examiner at the office when he takes the test. The examiner then directs him, along with others taking the same test, into the examination room where they are seated at chairs with writing arms. There are headphones at each chair. Each applicant is provided with a sheet of paper for transcribing the code message. The applicants are not allowed to have any paper other than the sheet provided. (TR 74)

10. The examiner plays the appropriate tape. The applicant listens to the tape through the headphones. The tape consists of instructions, a one minute practice message at the speed being tested, and then the test message, which is five minutes long. The applicant uses the blank back of the sheet to copy the test message. The examiner then gives the applicant

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[5] Beard did not file any findings or conclusions.

a written list of ten questions which he answers based on the contents of the tape he heard. He must answer seven correctly to pass. (Bureau Ex. 6, pp. 2-3)

11. The same questions are used for every 13 wpm test, but the answers vary according to the content of the code tape used. There are 11 versions of the 13 wpm test tape, any one of which may be used each time an applicant or group of applicants takes the 13 wpm test. (Bureau Ex. 6, p. 3)

12. As noted, *supra*, Applications Examiner Debra Thomas administers examinations in the New York office under Zimny's supervision.[6] (Bureau Ex. 6, p. 3) She has been employed by the Commission since 1972 and has been giving Amateur examinations since 1975. (TR 60-61) In administering the examinations Thomas receives the Amateur applications and Record Cards submitted by the applicants, seats them in the examination room, plays the tapes, hands out the various sets of questions for the code and written exams and corrects the exams. She also proctors the examinations. The examination room has glass panes in the walls, enabling her to continuously observe the applicants. She also maintains records and files concerning the applicants. (Bureau Ex. 6, p. 3)

B. The March 23, 1983 Amateur License Examination

13. On March 23, 1983, at 9:00 a.m. Thomas administered to Beard a 20 wpm code test, which he failed. (TR 63) At 10:00 a.m. she administered a 13 wpm test to him and other applicants. (TR 65, 74, 76, 77) Thomas played a 13 wpm test tape, handed each applicant the actual question sheet, and walked out of the examination room into her office where she performed other tasks. (TR 74, 76-77) When she looked up to check the applicants taking the 13 wpm test, she noticed that Beard was looking into his left hand which was cupped and down on the writing surface. (TR 77) His posture was in a "writing position". (TR 90). She believed he had his pencil in his right hand but was not writing. (TR 91) She walked into the examination room, over to him, and asked him whether he had anything in his hand. (TR 77) She found that he had unauthorized material, a small card, which is Bureau Ex. 5, in his hand. (TR 78) She asked him for the card, and he gave it to her. (TR 78) She picked up his code sheet, Bureau Ex. 3, and question sheet, Bureau Ex. 4, and walked him out of the examination room. (TR 78) She told him he had failed. (TR 86)

14. At the time Thomas terminated the examination. Beard had read the instructions on the question sheet, Bureau Ex. 4, as shown by check marks in boxes provided for that purpose next to the instructions. (Bureau Ex. 4, p. 2; TR 78) He had not answered any of the questions. (Bureau Ex.

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[6] Zimny and Thomas have knowledge of the exams and the answers to the exams. (TR 37; Bureau Ex. 6)

4, p. 1; TR 78) Bureau Ex. 3, the code test sheet provided for copying the code, is covered with writing but does not show any coherent message on either side. There are, however, individual words, e.g., "and name is" and "calm" written on the lined side, which is used to copy the test message. (Bureau Ex. 3, p. 1, lines 4 and 11)

15. Zimny and Thomas explained that Bureau Ex. 5, the card Beard had in his hand, contains information which would enable anyone to pass all 11 versions of the 13 wpm exam. (TR 37, 81) Zimny explained how a person desiring to cheat could use the card. (TR 37-46, 56-57) For each tape the card has the test answers as well as other words in the message which differ among the tapes. (TR 37, 40-41, 43-44) A person might be able to pass the exam if he were able to transcribe only one word. (TR 38-39, 41-44) After locating the word on the card he would be able to determine which answers applied to the tape being used that day. (TR 38-39, 41-44) If the person desiring to cheat could not transcribe any code at all, he could still select one set of the answers randomly and have a one out of 11 chance of passing. (TR 55-56)

16. Beard acknowledged that he had Bureau Ex. 5, the card, in his hand during the test, and that after he listened to the 13 wpm tape he was confronted by Thomas and handed the card to her. (TR 106-108)

C. Beard's Explanation For His Behavior

17. Beard acknowledged that he was not prepared to take the code test on March 23, 1983 and that he did not want to take it. (TR 102) However, he accompanied a fellow amateur, Bernie Dubbs, at the latter's urging, to the test. (TR 102) Dubbs suggested that he take the 20 wpm test so that the 13 wpm test would seem slower by comparison. (TR 102) Beard followed that plan, failed the 20 wpm test, and returned to the waiting room. (TR 103) Dubbs passed the 20 wpm test and then took the written element for Extra class. (TR 103)

18. Beard related that while waiting in the waiting room for the 13 wpm test to be given, he made the acquaintance of another amateur named "Bruce." (TR 104) He did not know "Bruce's" last name and could not remember his amateur call sign, although he thinks "Bruce" told him his call. (TR 104) He described "Bruce" as wearing an Army flack jacket, jeans and sneakers and having curly dirty blonde hair and a "peach-fuzzy" "attempt at a beard." (TR 104, 122-23, 126)

19. Beard described the layout of the waiting room as follows: The room contained rectangular tables with seats on the long side and one seat on each end. (TR 114, 117) The tables were parallel to a counter which divided the waiting room from the area where Thomas had her office. (TR 117, 103-104) There was a swinging door or gate on the right end of the counter. (TR 117) Also to the right, separated from the rest of the area by a glass partition or wall, was the examination room. (TR 117) To get into

the examination room applicants first passed through the gate on the right of the counter. (TR 106, 117)

20. While Beard was waiting for the 13 wpm exam, there were a lot of people in the waiting room. (TR 104) Beard related that he was sitting at the table closest to the counter, seated with his back to the counter; shortly before the 13 wpm exam was given Dubbs joined him at the table, sitting at the end of the table to Beard's right. (TR 104, 111-13, 159-61) Beard further related that "Bruce" was seated on the other end of the table to Beard's left (that is, toward the swinging door in the right end of the counter and the examination room) (TR 111-13); that "Ray Miller, KA2QQG" was "right there," standing near the table to Beard's right.[7] (TR 14-113) Beard explained that there was conversation going on among the people at the table. As part of the conversation, "Bruce" asked him what test he was taking, and Beard replied that he was taking the General (13 wpm) test and didn't think he was going to pass. (TR 105, 115-16)

21. When Thomas asked those who were waiting to take the General code test to enter the testing area, Beard and the other applicants rose and walked through a swinging door or gate in the counter. According to Beard, "Bruce" handed him the card, Bureau Ex. 5.[8] (TR 105-106, 117-118) Beard, who was walking and talking with Ray Miller as he received the card, claimed that he thought it might be a note or business card but also that he "turned it over and ... saw the little lines and the blank side on the other side." (TR 118-121) He explained that he didn't put the card away in a pocket because his shirt had no pocket and the card was too "delicate" and "thin" to put in the pocket of his trousers. (TR 120) When he got to his seat, he claimed, he put the card down in front of him, although he knew that the paper provided by the Commission was all he was supposed to have on the desk. (TR 106, 130)

22. Beard acknowledged that after he had listened to the 13 wpm tape and looked at what he had copied, he realized he wasn't going to pass the test. (TR 107) He maintained that he put his pencil down and, noticing the card sticking to his arm, he peeled it off and looked at it closely; realizing what it was, he put it down, and when he looked up he saw Thomas looking at him. (TR 107-108)

23. Beard, who had failed the Technician's exam 5 or 6 weeks earlier, was aware that he wasn't suppose to bring anything into the examination. (TR 134) Beard acknowledged that he did have "a suspicious nature," because he was looking into his hand and that Thomas did "exactly what she was supposed to do." (TR 129-130, 138)

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[7] Miller is a member of Beard's club, the Westchester Emergency Communications Association, as is Dubbs. Miller, who did not travel in the car to and from the test with Dubbs and Beard, did not testify. (TR 113, 121-23)

[8] Beard is right handed and, thus, received the card in his right hand. (TR 119)

24. As noted, *supra*, Beard had taken the 13 wpm test in February 1983 and failed it. (TR 138) He had also taken and passed a written element, Element 3, to qualify for Technician Class at about that time.[9] (TR 132-33) He did not recall reading the warning against attempting to obtain an amateur license by fraudulent means on the written test.[10] He acknowledged that he knew "right from wrong." (TR 136-37)

D. Dubbs' Recollection Of The March 23, 1983 Examination

25. As noted, *supra*, Dubbs had passed the 20 wpm test, which Beard had failed, and, as a result, he continued the examination by taking the written element. (TR 155) The examiner graded the written element, told Dubbs he had passed it and issued him an interim permit. (TR 155) Dubbs then joined Beard in the waiting room for a short time, perhaps two minutes or five minutes, before Beard went in to take the General (13 wpm) code test. (TR 155)

26. Dubbs recalled that he and Beard were sitting at the table closest to the counter and that while they were sitting at the table waiting for the General code test, there was a man fortyish, stockily built, and wearing jeans and a jacket. (TR 143-44, 157) He also recalled that this person sat near the corner of the table facing the counter and Beard sat at the end of the table with his back to the exam room. (TR 158-59)

27. Dubbs did not recall whether he watched Beard leave for the 13 wpm test. (TR 163) He may have been talking to someone. (TR 163) He did not see the person he had previously described hand Beard the card. (TR 149, 163)

28. Dubbs related that after the 13 wpm test Beard wanted to leave at once. After they left Beard told him about the card, which looked like it had answers to the test, and about the person he said gave it to him. (TR 145) As they were driving home, Dubbs gave Beard "the third degree," and that, in response, Beard told him someone had given him the card as he was going into the examination room and in the rush he put the card on the table. (TR 146) Dubbs advised him, "don't say anything to any of the boys . . . It's a terrible embarrassment." (TR 152)

29. Dubbs acknowledged that during the ride home Beard did not identify the person who gave him the card and Dubbs did not ask him. (TR 146) Dubbs explained that he was able to recall the person whom he described as being at the examination after Beard described "Bruce" a day or so later. (TR 147, 151-52)

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[9] He had taken and failed Element 3 at least once previously. (TR 131)

[10] In capital letters at the top of the technicians' exam paper is the warning that any attempt to obtain an Amateur license by fraudulent means or by copying or divulging questions used in the examinations will constitute a violation of FCC Rules, for which penalties are provided. (TR 136)

30. Dubbs is older than Beard. Their friendship is a result of their amateur radio activities. Dubbs is an active amateur in the two clubs to which they belong. (TR 102-103, 150, 153-154)

E. Beard's Failure To Attempt To Find Bruce

31. Beard never made any attempt to find "Bruce." (TR 126-127) He did not look for him in the waiting room after the exam was terminated. He did not remember if "Bruce" was still in the room. He explained that he was so embarrassed that he just wanted to leave. (TR 126) He said, "I asked Mr. Dubbs if he knew who I was talking about the day that it occurred. He couldn't even remember who I was talking about at the time." (TR 127) Beard claimed that at first he did not realize there would be any consequences, other than failing the exam on March 23. (TR 125) He reasoned that he had not attempted to obtain anything fraudulently since he had not handed in any answers. (TR 126-127)

32. After he received the *Order To Show Cause*, he made no attempt to find "Bruce". (TR 127) He never asked Ray Miller whether he had seen "Bruce". (TR 127-28, 129) He never made any attempt to contact others who took amateur exams on the same day in an attempt to find "Bruce," not even after he received copies of the Amateur Record Cards identifying all who took the exams on March 23, 1983.[11]

F. Beard's Application for General Class Operator License

33. As noted in paragraph 13, *supra*, when Debra Thomas observed that Beard had unauthorized material in the examination room, she picked up his code sheet, Bureau Ex. 3, and question sheet, Bureau Ex. 4, and also took from him the card that he was looking at, Bureau Ex. 5. She told him that he had failed the examination and that he would have to wait 30 days before he could again take the examination for General Class Operator license. (TR 78, 86, 93) Beard waited the 30 day period and took the General Class Operator examination in late April 1983. He passed the examination at that time and was issued an Interim Amateur Permit with General Class privileges. This permit was for a 90 day period and on July 26, 1983 the interim permit was renewed. (TR 8-11)

34. When Thomas took the test papers from Beard and informed him that he had failed, she then wrote a memorandum to the Field Public Service Division, headquartered in Washington, D.C., relating what happened with respect to Beard. She attached Bureau Exhibits 1-5 to the memorandum and forwarded it to headquarters. (TR 86)

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[11] Beard received these cards from the Bureau in December 1983 as part of the Bureau's exhibit exchange. (TR 129) No one with the first or last name of "Bruce" or with a middle initial "B." took any amateur or other operator exams on March 23, 1983. (TR 166, 168; Bureau Ex. 7)

35. As noted in paragraph 2, *supra*, the Chief, Private Radio Bureau, acting pursuant to delegated authority, on September 9, 1983, issued the *Order To Show Cause and Suspension Order* in this proceeding and, subsequently, on October 17, 1983, issued the *Further Order* which designated this matter for hearing. More particularly, the *Further Order* provided, pursuant to Section 97.32(e) of the Rules, 47 CFR 97.32(e), that Beard's Interim Amateur Permit for General Class license was set aside.

Ultimate Findings and Conclusions

1. The issues designated in this proceeding seek to determine whether Vincent J. Beard (Beard) wilfully violated Section 97.129 of the Commission's Rules, 47 CFR 97.129, by attempting to obtain a General Class Amateur Radio license by fraudulent means. The ultimate question to be resolved is whether, on the basis of the record evidence, Beard's license for Amateur Radio Service N2EDW should be revoked; whether Beard's technical class operator permit license should be suspended for the remainder of its term, and whether the public interest would be served by a grant of Beard's application for General Class Operator license. For the reasons articulated, *infra*, it is concluded that the station license N2EDW should be revoked, Beard's Technical Class Amateur Radio Operator License suspended for term and his application for General Class Operator license denied as not in the public interest.

2. It is undisputed that Beard had in his possession and was looking at unauthorized material during his March 23, 1983 examination for General Class Operator. This material was a card containing answers to the examination he was taking. Beard not only acknowledged that he had the card in his hand but that his actions were of a "suspicious nature" in that he was looking into his hand at the card when Applications Examiner Debra Thomas (Thomas) terminated his examination. Beard's explanation that he was given the card by a stranger called "Bruce" as he entered the examination room and that he was merely looking at the card to determine what it was after he realized that he couldn't pass the examination is rejected as inherently improbable. Significantly, Beard's claim of receipt of the unsolicited card from an unknown stranger is not collaborated in any way. Bernie Dubbs, an Amateur who accompanied Beard to the examination, did not see the purported stranger "Bruce" give anything to Beard. In fact, Dubbs' description of the individual who was talking to Beard shortly before Beard entered the examination differs markedly from Beard's.[12]

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[12] Beard's describes "Bruce" as having curly dirty blonde hair and a "peach-fuzzy" attempt at a beard, indicating that he was youthful whereas Dubbs described the stranger as being "fortyish."

3. The Presiding Judge agrees with the Bureau that it is highly improbable that another Amateur would hand a crib sheet to a total stranger in the Commission's Offices because such an Amateur would recognize that if it was detected or if the prospective donee reported the incident to the Commission, such an Amateur would unquestionably loose his license. It strains credulity to believe that a non-Amateur would have sufficient interest in the code test given by the Commission to have come into possession of all of the answers to the 11 tests which could be given. Certainly, it is more than improbable that such an individual would enter on Federal property and volunteer to help a stranger cheat to obtain a license. Stated simply, the "Bruce" story related by Beard is rejected as inherently improbable and irreconcilable with common observation and experience. As the Commission ruled in *The Prattville Broadcasting Co.*[13] case, the explanation is "so opposed to all reasonable probabilities as to be manifestly false." It is found that Beard intentionally cheated while taking the March 23, 1983 examination and that, as a consequence, Beard does not possess the requisite qualifications to be a licensee of this Commission.

4. As noted, *supra,* Section 97.129 of the Commission's Rules prohibits anyone from obtaining or attempting to obtain an operator's license by fraudulent means. Beard's action in having brought to the examination room the unauthorized material constituted a wilful violation of this rule. This Commission must be able to be assured that those taking its examinations are not cheating and it must take affirmative action against anyone who is found subverting the examination procedures. Revocation of Beard's Amateur Radio Service Station license for Station N2EDW and suspension for term of his Technician Class Amateur Operator's license are warranted by the facts in this case if the integrity of the Commission's amateur license program is to be preserved. Denial of Beard's application for General Class operator license is mandated by the conclusion that he does not possess the requisite qualifications to be a licensee of this Commission.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, 47 CFR 1.276:

(1) The license of Vincent J. Beard for Station N2EDW in the Amateur Radio Service IS REVOKED;

(2) The Technical Class Amateur Radio Operator License of Vincent J. Beard IS SUSPENDED FOR TERM;

(3) The application of Vincent J. Beard for General Class Operator License IS DENIED.

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[13] 5 FCC 2d 601, 602 (Rev. Bd. 1966).

IT IS FURTHER ORDERED that a copy of this Initial Decision SHALL BE SENT by Registered Mail-Return Receipt Requested to Vincent J. Beard, 2 Soundview Avenue, Apt. D, White Plains, New York 10606.[14]

FEDERAL COMMUNICATIONS COMMISSION

THOMAS B. FITZPATRICK, *Acting Chief Administrative Law Judge*

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[14] In the event exceptions are not filed within 30 days of release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision is to become effective fifty (50) days after its public release, pursuant to 47 CFR 1.276(d). Upon the effective date of this Initial Decision, Beard shall forward to the Commission the revoked and suspended licenses. Operation of Station N2EDW after the effective date of the license revocation is in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. 301, and may subject any person operating such station to penal sanctions specified in Section 501 of the Act, 47 U.S.C. 501.